86-253

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN,
ET AL.,

Appellants,

v.

YAHN & MCDONNELL, INC. AND
THE PENNSTAR COMPANY, ET AL.,

Appellees.

On Appeal From The United States Court of Appeals
For The Third Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, is an appellant. The PBGC was granted leave to intervene post-judgment by the court of appeals

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UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, et al.,

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v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY, et al.,

Appellees.

On Appeal From The United States Court of Appeals For The Third Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (PBGC JS[1] App. A, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (PBGC JS App. B, 41a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals (PBGC JS App. C, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation, a wholly-owned government corporation and an agency of the United States,

1. References to "PBGC JS" are to the Jurisdictional Statement of the Pension Benefit Guaranty Corporation, No. 86-231 (filed August 14, 1986), which seeks review of the same judgment.

was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this Court (PBGC JS App. D, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (PBGC JS App. E, 54a-55a). The petition for rehearing of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Plan), *et al.*, was also denied on April 23, 1986 (App. A, *infra*, A-1). The PBGC filed a notice of appeal to this Court on May 21, 1986 (PBGC JS App. F, 56a-57a). The Plan also filed a notice of appeal to this Court on May 21, 1986 (App. B, *infra*, A-2). On July 9, 1986, Justice Brennan extended the time for docketing the PBGC's appeal to and including August 19, 1986. On July 11, 1986, Justice Brennan extended the time for docketing the Plan's appeal to and including August 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001 *et seq.*, are set forth at PBGC JS App. H, 60a-67a.[2] The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a

2. ERISA was recently amended, in respects not relevant to this case, by the Single-Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 *et seq.*

preponderance of the evidence that the determination was unreasonable or clearly erroneous.

STATEMENT

The appellee employers, Yahn & McDonnell, Inc. ("Yahn") and The Pennstar Company ("Pennstar") challenged the constitutionality of the withdrawal liability assessed by the Plan as a result of Yahn's withdrawal from the Plan in November, 1981. The statutory background to the Plan's assessment of liability is set forth adequately in Part A of the Statement in the JS filed by the PBGC. The statutory process followed by the Plan in assessing the liability against Yahn is as described by the PBGC in Part B of the Statement in the JS filed by the PBGC. The facts of this case are as presented in Part C of the Statement in the JS filed by the PBGC. The Plan adopts the contents of the PBGC's JS under the heading "Statement."

THE QUESTION IS SUBSTANTIAL

The decision of the Third Circuit conflicts with the decisions of five other court of appeals. See *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), cert. denied, 105 S. Ct. 2116 (1985); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), cert. denied *sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), cert. denied, 104 S. Ct. 3553 (1984). For this reason alone, this Court should note probable jurisdiction to resolve a conflict among the circuits.

The court of appeals erred in relying on the "biased decisionmaker" cases decided by this Court, and the result it reached threatens substantially to increase the number and complexity of arbitration proceedings which multiemployer pension plans will be subjected to by employers objecting to their liability. Such a result will seriously interfere with the enforcement of employer obligations under the MPPAA. The question presented in thus of substantial practical importance and warrants plenary review by this Court.

The Plan adopts the reasoning and analysis presented by the PBGC in its JS under the heading "The Question Is Substantial" and urges this Court to note probable jurisdiction for the reasons set forth by the PBGC, as well as those set out above.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1035 & 1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN AND ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS AND JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN,
Appellees/Cross-Appellants

v.

YAHN & MCDONNELL, INC. AND THE PENNSTAR COMPANY,
Appellants in 85-1035/Cross Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, ROSENN,* *Circuit Judges*

The petition for rehearing filed by Appellees/Cross-Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Seitz, Gibbons, Garth, and Sloviter would grant the petition for rehearing.

By the Court,

/s/ Edward R. Becker

Judge

Dated: April 23, 1986

*As to panel rehearing only.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1035 and 85-1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN AND ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS AND JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL 115 PENSION PLAN,

Appellants in No. 85-1065

and

PENSION BENEFIT GUARANTY CORPORATION,

Intervenor

vs.

YAHN & MCDONNELL, INC. AND THE PENNSTAR COMPANY,

Appellants in No. 85-1035

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §1252, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan et al., Appellees/Cross-Appellants, hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on March 31, 1986, in the above-captioned matter.

Respectfully submitted,

/s/ Paula R. Markowitz

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Nos. 86-231, 86-253

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PENSION BENEFIT GUARANTY CORPORATION

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UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

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MOTION TO AFFIRM

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Dated: November 6, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-231, 86-253

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,

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v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,

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MOTION TO AFFIRM

JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on March 31, 1986. A petition for rehearing filed by the Pension Benefit Guaranty Corporation ("PBGC"), which was allowed by the court below to intervene (J.S. App. 52a-53a), was denied on April 23, 1986 (J.S. App. 54a-55a). The PBGC filed a notice of appeal in No. 86-231 on May 21, 1986 (J.S. App. 56a-57a). On July 9, 1986, Justice Brennan extended the time for docketing the appeal to and including August 19, 1986, and the appeal was docketed on August 14, 1986. The appellants in No. 86-253, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan,

et al., filed a notice of appeal on May 20, 1986, which was docketed on August 18, 1986.

The court below held that section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982) is unconstitutional because it deprives the employer of "an impartial decisionmaker" (J.S. App. 21a) and thus falls foul of such decisions as *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Tumey v. Ohio*, 273 U.S. 510 (1927), among others. Since an Act of Congress was held by the court below to be unconstitutional, the case falls squarely within the provision of 28 U.S.C. § 1252 (1982). Consequently, there is no basis to contest the jurisdiction of this Court if the question is a substantial one.

Because the decision below is in conflict with decisions of five other courts of appeals, and there are sharp divisions in the *en banc* review in two of these courts, the appellee does not feel that it can be seriously contended that the question is not substantial.

Accordingly, it appears that the Court has jurisdiction of the appeal.

MOTION TO AFFIRM

The question at issue in this case, though of constitutional dimension, is a relatively narrow one, and may not warrant plenary consideration in this Court. Nevertheless, it is a recurring question and should be definitively settled by a decision of this Court. Accordingly, the appellees move that the decision below should be affirmed.

The reasons for this motion are well stated by Judge Becker in his opinion for the majority below (*see* particularly, J.S. App. 18a-28a) and in the dissenting opinion of Judge Aldrich in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1148 (1st Cir. 1985). These opinions relied primarily on such cases as *Gibson v. Berry-*

hill, 411 U.S. 564 (1973), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927). *See also Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979).

In response to the decision below, the PBGC contends that pension plans can act impartially and may sometimes make decisions to reduce liability. However, the plan trustees "bear[] an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).[1] The legislative history demonstrates that Congress expected pension plans to act as ordinary litigants pursuing their statutory self-interest:

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. 126 Cong. Rec. 23,288 (1980) (remarks of Senator Williams, MPPAA co-sponsor).

That a "responsible creditor" acting "prudent[ly]" to "maximiz[e] the total ultimate recovery" may sometimes make decisions that lessen liability does not mean he may sit as judge on his own case.

The PBGC contends that the trustees cannot put their bias into effect, because some actuarial decisions are delegated to the plan actuary. It is hard to see how a defect in the statute can be cured by a further delegation to an entrepreneur who owes his appointment to the trustees. The PBGC's own source shows that there is great variation among actuaries on the critical actuarial as-

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[1] Remarkably, neither the PBGC nor the Plan cited *Amax Coal* in their respective Jurisdictional Statements.

sumptions, and a plan is free to shop for an actuary whose "philosophy" fits the plan's.[2]

The PBGC contends that the plan cannot effectuate its bias in applying statutory exemptions, because legal determinations are not subject to the presumption. That begs the question. There is no basis in law or policy to shield the plan's factual determinations that underlie whether, on a case-by-case basis, a particular exemption does or does not apply.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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The Pennstar Company

Dated: November 6, 1986

---

[2] General Accounting Office, Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans (1985), at 24. The Report also notes: "Notwithstanding the variables inherent in the determination of a plan's withdrawal liability, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.*

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QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to this proceeding (No. 86-253) are Robert E. Zimmer, Michael Paolella, John P. Morris and James Smith, Jr., Trustees of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, ET AL.,
Appellants

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLANTS IN NO. 86-253

OPINIONS BELOW

The opinion of the court of appeals (PBGC JS[1] App. A, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (PBGC JS App. B, 41a-49a) is unreported.

1. References to "PBGC JS" are to the Jurisdictional Statement of the Pension Benefit Guaranty Corporation, No. 86-231 (filed August 14, 1986), which seeks review of the same judgment.

JURISDICTION

The judgment of the court of appeals (PBGC JS App. C, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this court (PBGC JS App. D, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (PBGC JS App. E, 54a-55a). The petition for rehearing of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Plan), *et al.*, was also denied on April 23, 1986. (Plan JS App. A., A-1). The PBGC filed a notice of appeal to this Court on May 21, 1986 (PBGC JS App. F, 56a-57a). The Plan also filed a notice of appeal to this Court on May 21, 1986 (Plan JS App. B, A-2).

On December 1, 1986, the Court noted probable jurisdiction of the appeal of the PBGC (No. 86-231) and the Plan (No. 86-253). The Court also ordered the cases consolidated.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001 *et seq.*, are set forth at PBGC JS App. H, 60a-67a. The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment, which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The following statement is adopted from the statement in the Jurisdictional Statement of the PBGC.

A. The Statutory Background.

The history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, has been described in detail by this Court in *Connolly v. PBGC*, 106 S. Ct. 1018, 1021-1022 (1986), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-723 (1984). In brief, it became apparent to Congress that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from, multiemployer plans." *Gray*, 467 U.S. at 722. Congress further concluded that ERISA created undesirable incentives for employers to withdraw, leaving plans with inadequate funding. The absence of effective withdrawal liability provisions encouraged a " 'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. 20178 (1980) (remarks of Sen. Javits).

The MPPAA was designed primarily to discourage employer withdrawals from multiemployer pension plans, while at the same time not acting as a disincentive to new employers who might consider becoming contributors to such plans. *See* H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 15 (1980); *Connolly*, 106 S. Ct. at 1021-1022; *Gray*, 467 U.S. at 721-723. As the Court stated in *Connolly*, the MPPAA "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." 106 S. Ct. at 1026. Thus, "the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Gray*, 467 U.S. at 725, quoted in *Connolly*, 106 S. Ct. at 1022. Various determinations made by the trustees in the process of collecting this debt are presumed correct under Section 104(2) of the MPPAA, 29 U.S.C. §1401(a)(3), "in order to ensure the enforceability of employer liability." H.R. Rep. No. 869, Pt. I, *supra*, at 86.

B. The Statutory Process For Determining Withdrawal Liability.

Withdrawal liability is an employer's statutory share of the pension plan's "unfunded vested benefits." 29 U.S.C. §1381(b). "Unfunded vested benefits" are "(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." 29 U.S.C. §1393(c). The plan sponsor[2] determines the employer's share of unfunded vested benefits by using one of several

2. The "plan sponsor" of the multiemployer pension plan is defined in 29 U.S.C. §1301(a)(10)(A) as the plan's joint board of trustees.

allocation methods specified in 29 U.S.C. §1391. The "presumptive" or "basic" method of allocation, which was employed in this case, is set forth in Section 1391(b), and alternative allocation methods are set forth in Sections 1391(c)(2), (3) and (4). In addition, the Act permits the plan sponsor to use an allocation method of its own design, subject to the PBGC's approval based on the PBGC's determination that the plan's method will "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. §1391(c)(5)(A).[3] The MPPAA requires that the allocation method applied to a specific withdrawal may not be different from the plan-wide method in effect on the date of that withdrawal, and the Act further requires uniform application to all withdrawing employers of whichever allocation method the plan sponsor has selected. 29 U.S.C. §1394. *See* H.R. Rep. No. 869, Pt. I, *supra*, at 85.

Under the presumptive method of allocation, the plan sponsor must determine a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits. 29 U.S.C. §1391(b)(1)(A), (B) and (C). These shares are derived from fractions comparing the employer's contributions to the plan to the contributions made by all employers to the plan during the same periods. 29 U.S.C. §§1391(b)(2)(E)(ii), 1391(b)(3)(B), 1391(b)(4)(D)(ii).

The amount of an employer's withdrawal liability also depends on the value of the plan's unfunded vested benefits (nonforfeitable benefits minus assets) that are subjected to the allocation process. In calculating the value of nonforfeitable benefits under a pension plan, it

3. *See* H.R. Rep. No. 869, Pt. I, *supra*, at 77:

> The bill provides a basic method for determining an employer's withdrawal liability, three alternative methods which a plan may elect, and allows plans to develop additional allocation methods. The basic method[] is the one that applies unless a plan is amended to adopt a different method.

is necessary to use certain "actuarial assumptions and methods," which either must follow regulations that the PBGC is authorized to issue[4] or be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a).

As soon as is practicable after an employer's withdrawal from a pension plan, the plan trustees must notify the employer of "the amount of the liability" and "the schedule for liability payments" and make demand for payment. 29 U.S.C. §1399(b)(1). The employer may then ask the plan trustees to review any specific matter relating to the determination of liability, may identify any inaccuracies in the determination, and may "furnish any additional relevant information." 29 U.S.C. §1399(b)(2)(A). The trustees must review the issues raised by the employer and notify the employer of their decision and the basis for it. 29 U.S.C. §1399(b)(2)(B).

The MPPAA also prescribes procedures to be followed if, after the above-described steps, a disagreement remains between the pension plan and the employer over any determination made by the plan trustees relating to the employer's withdrawal liability. 29 U.S.C. §1401. Either the employer or the plan may initiate arbitration, which must be conducted in "accordance with fair and equitable procedures" (29 U.S.C. §1401(a)(2)) that have been promulgated by the PBGC.[5] Section 1401(a)(3)(A) of the MPPAA, the provision found unconstitutional by the court of appeals, provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party

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4. The PBGC has not yet decided whether to promulgate regulations concerning appropriate actuarial assumptions.

5. *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. 34679 (1985) (to be codified at 29 C.F.R. Pt. 2641).

> contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Act also accords a presumption of correctness to the actuarial assumptions and methods used to determine a plan's unfunded vested benefits. 29 U.S.C. §1401(a)(3)(B).

Congress explained that "[t]hese [presumptions] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, *supra*, at 86. *See also* Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter cited as *Senate Labor Summary*].[6] Finally, the MPPAA vests the federal district courts with jurisdiction to review the arbitrator's final decision. 29 U.S.C. §1401 (b)(2). In any such proceeding, "there [is] a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. §1401(c).

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6. The *Senate Labor Summary* stated (at 20-21):

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

C. The Facts Of This Case.

Yahn & McDonnell, Inc. (Yahn) entered into a series of collective bargaining agreements with United Retail and Wholesale Employees Teamsters Union Local No. 115 (the Union) (C.A. App. 15), the last of which was a three-year agreement executed in January, 1980 (C.A. App. 7, 15).[7] These collective bargaining agreements required Yahn to make contributions to the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (PBGC JS App. A, 6a).

The Pension Plan is a multiemployer pension trust established under Section 302 (c) (5) of the Labor Management Relations Act, 29 U.S.C. §186 (c) (5), and a "multiemployer plan" within the meaning of ERISA, 29 U.S.C. §1002 (37) (A) (C.A. App. 5). The Plan is administered by four trustees, two of whom were appointed by contributing employers and two of whom were appointed by the Union (PBGC JS App. A, 6a). The trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. §1002 (21) (A).

Yahn made all of the contributions required by the collective bargaining agreements until November, 1981, when it ceased operations and withdrew from the Pension Plan (PBGC JS App. A, 6a). In April, 1982, the Plan issued a demand for payment of approximately $458,000 in withdrawal liability (*ibid.*).[8] In its demand for payment, the Plan stated, *inter alia*, that it had elected to use the presumptive method for determining Yahn's liability and that, "[u]nder this method, the Fund Actuary,

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7. The court of appeals' opinion incorrectly states that Yahn's last agreement with the Union was executed in December, 1980. *See* PBGC JS App. A, 6a.

8. The Plan advised Yahn that the Plan reserved the right to look to Yahn's parent company, appellee Pennstar, for payment if Yahn could not afford to pay the withdrawal liability itself. *See* 29 U.S.C. §1301(b); PBGC JS App. A, 6a-7a & n.2.

Peat, Marwick, Mitchell & Co., has determined the withdrawal liability of Yahn & McDonnell, Inc." (C.A. App. 46, 109).

In July, 1982, Yahn made a request for review of the liability determination (PBGC JS App. A, 7a). Yahn requested consideration of several specific issues, including the actuarial assumptions employed to calculate the Plan's unfunded vested benefits (C.A. App. 56). The trustees reviewed their initial assessment of liability at a meeting attended by counsel for the Pension Plan, counsel for Yahn, and two employees of Peat, Marwick, Mitchell & Co., the Plan's actuary (C.A. App. 102-116). At the conclusion of the trustees' review, Yahn was advised that the withdrawal liability assessment would not be altered (PBGC JS App. A, 7a).

Yahn invoked its right to arbitration, but the arbitration proceeding was placed in abeyance pending resolution of the constitutional issues raised by Yahn in this litigation (PBGC JS App. A, 7a). No arbitration proceeding has ever been conducted concerning Yahn's specific disagreements with the trustees' assessment of withdrawal liability.

The Pension Plan and its trustees commenced this action in the United States District Court for the Eastern District of Pennsylvania to collect Yahn's withdrawal liability (PBGC JS App. A, 7a). In its answer, Yahn raised numerous constitutional challenges to the MPPAA; among other things, Yahn asserted that the MPPAA denied it due process because the initial determination of liability was made by biased trustees (*ibid.*). After briefing, the district court upheld the MPPAA against all of Yahn's constitutional attacks, but dismissed the Plan's request for attorneys' fees, costs, and liquidated damages (PBGC JS App. B, 41a-49a).

Yahn appealed from the adverse judgment against it, and the Pension Plan appealed from the denial of attorneys' fees, costs, and liquidated damages. Relying on "Congress' obvious desire to ensure the solvency and

stability of pension plans" (PBGC JS App. A, 12a), the court of appeals first affirmed the district court's ruling that the MPPAA authorizes the Plan to maintain an action to collect withdrawal liability payments pending arbitration. Thus, the court of appeals upheld the district court's award of interim liability payments to the Plan (*ibid.*). Second, the court of appeals agreed with the Plan that the MPPAA compels an award of attorneys' fees, costs, and liquidated damages upon a judgment in favor of a pension plan for delinquent payments. With respect to this issue, therefore, the court of appeals reversed the district court's ruling that such an award would be premature prior to arbitration (*id.* at 13a-14a).

Finally, in a divided decision, the court of appeals reversed that portion of the district court's judgment upholding the MPPAA against Yahn's procedural due process challenge. The court of appeals did not question the district court's conclusion that the statutory presumptions of correctness "survive a substantive due process analysis and a *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] test" (PBGC JS App. A, 28a; *id.* at 32a-33a n.24), but it held that the district court erred in failing to analyze the alleged bias of the trustees separately from the adequacy of the procedural safeguards built into the review process (*id.* at 19a). Thus, the court of appeals analyzed Yahn's procedural due process claim under cases such as *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey v. Ohio*, 273 U.S. 510 (1927).

Although the court of appeals acknowledged (PBGC JS App. A, 16a) that its decision was contrary to that of every other circuit to consider the issue,[9] the court held

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9. *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Bd. of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d

that multiemployer pension plan trustees are "biased" in favor of maximizing collections of withdrawal liability because the trustees have fiduciary duties of loyalty to the plan under Section 404 of ERISA, 29 U.S.C. §1104, and may be subject to personal liability for violating those duties under Section 409 of ERISA, 29 U.S.C. §1109 (PBGC JS App. A, 21a-25a). The court further held that the trustees' "manifest and significant bias" (*id.* at 24a) was not cured by limits on the scope of their decisionmaking authority (*id.* at 25a-27a). Instead, the court was of the view that the trustees have broad discretion to (1) select from among four statutory methods, or their own method, for allocating withdrawal liability; (2) determine appropriate actuarial "discount rates"; and (3) determine the applicability of several statutory exemptions to the Act's withdrawal liability provisions (*ibid.*). Accordingly, the court concluded that the trustees' role is "adjudicative" because "[t]he trustees perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (*id.* at 26a-27a n.18 (emphasis added)). Finally, the court held that the opportunity for further review — specifically, the right to invoke arbitration and review in federal district court — did not remove the taint of the trustees' bias because, under the statutory presumptions of correctness, any subsequent proceedings would themselves be tainted by the initial decision of the supposedly biased trustees (*id.* at 27a-28a).

1396 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984).

For relief, the court of appeals determined that the statutory presumption of correctness accorded the trustees' liability determinations in arbitration could be severed from the remainder of the statute (PBGC JS App. A, 28a-33a).[10] Thus, the court rewrote the statute to require de novo determinations of withdrawal liability in arbitration proceedings. Such de novo proceedings, the court held, would satisfy the constitutional requirement of an impartial decisionmaker (*id.* at 31a-32a).[11]

Judge Seitz dissented from the majority's resolution of the constitutional question. He took issue with the court's view of the breadth of discretion available to the trustees in making determinations of withdrawal liability (PBGC JS App. A, 35a-39a), concluding that "whatever residual discretion the trustees enjoy is [not] inconsistent with due process" (*id.* at 39a). Judge Seitz also expressed concern that the court's invalidation of the statutory presumption of correctness "promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress

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10. The court of appeals struck down only subparagraph (A) of Section 1401(a)(3), which accords a presumption of correctness to the trustees' determinations of liability and their application of various exemptions and mitigating provisions authorized by the Act. However, in its discussion of specific decisions purportedly made by the trustees, the court appeared to find that the selection of actuarial assumptions posed the greatest risk of harm to withdrawing employers (PBGC JS App. A, 18a, 26a). Yet the court did not in terms invalidate the presumption of correctness contained in subparagraph (B) of Section 1401(a)(3), which applies expressly to actuarial assumptions.

11. Upon learning that the court of appeals had held a provision of the MPPAA unconstitutional, the PBGC filed a motion to intervene for the purposes of seeking rehearing and further review, if necessary, in this Court. The court of appeals granted the PBGC's motion to intervene (PBGC JS App. D, 52a-53a), but it denied rehearing (PBGC JS App. E., 54a-55a).

feared, 'be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan'" (*id.* at 40a (quoting *Senate Labor Summary* 21)).

The PBGC's and the Plan's petitions for rehearing en banc were denied over the dissenting votes of four judges (PBGC JS App. E, 54a-55a; Plan JS App. A, A-1).

SUMMARY OF ARGUMENT

The court of appeals erred in determining that pension plan trustees are impermissibly biased against withdrawing employers and in concluding that the presumption of correctness accorded to their decisions violates the Due Process Clause. Trustees would not satisfy their fiduciary duties, as the court of appeals erroneously assumed, by assessing the maximum withdrawal liability against withdrawing employers; instead, they have an obligation to make equitable assessments of withdrawal liability. Moreover, the decisions made in assessing withdrawal liability are not adjudicative decisions over which the trustees have significant discretion. The decisions at issue are made, in reality, by impartial decisionmakers.

The Due Process Clause is not violated by deferring to the decisions of private trustees. Decisions of trustees are ordinarily presumed correct under the well-established arbitrary and capricious standard, as are the decisions of other private parties, without raising due process concerns. The statutory presumption merely places a particular burden of proof on one party and upholds the decisions of trustees only if they are reasonable. The presumption thereby effectuates the congressional purpose of preserving the fiscal integrity of multiemployer pension plans; the alternative — de novo review — would threaten the financial soundness of those plans.

ARGUMENT

The heart of the court of appeals' holding that Section 1401 (a)(3)(A) is unconstitutional is its determination that pension fund trustees are impermissibly biased, as a matter of law, against withdrawing employers, and that the statutory presumption of correctness accorded to their decisions violates the Due Process Clause. In reaching this result, the court of appeals did not utilize the standards established by this Court to be used in evaluating whether or not a decisionmaker is impermissibly biased. In addition, the court of appeals erred in determining that pension fund trustees are biased against withdrawing employers. Application of the appropriate legal standards to a more realistic evaluation of the role of trustees demonstrates that those trustees cannot be considered biased, as a matter of law, and that Section 1401 (a)(3)(A) does not violate the Due Process Clause.

A. The Appropriate Constitutional Test For Decisionmaker Bias.

The seminal case for determining whether a judicial officer is impermissibly biased is *Tumey v. Ohio*, 273 U.S. 510 (1927). At issue in *Tumey* were state statutes that provided for trial of criminal charges by the mayor of the village where the crimes were committed. The mayor was vested with the authority to determine the guilt or innocence of an accused person and to order the imposition of a fine against the criminal defendant. In addition to his normal salary, the mayor received compensation from his service as a judge in two ways: first, the mayor received fees taxed against the defendant, but only if the defendant was convicted. Second, the mayor's village received a substantial portion of the fines assessed by him.

The Court first noted that "[a]ll questions of the judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." 273 U.S. at 523. However, the Court found that a criminal defendant is deprived of due process of law if the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* The Court then found that the mayor had a direct, personal, pecuniary interest in convicting and fining criminal defendants because the mayor received payments if, and only if, the defendant was convicted.

Subsequent cases have affirmed that persons with a direct pecuniary interest in a case cannot sit in an adjudicative capacity on that case. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the district court held that members of the State Board of Optometry were so biased by personal pecuniary interest that they could not, consistent with the Due Process Clause, conduct hearings to determine whether other optometrists in competition with them should lose their licenses. This Court first stated: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes." *Gibson v. Berryhill*, 411 U.S. at 579. The Court then deferred to the conclusion of the district court, with its superior understanding of local matters, that the pecuniary interests of the board members were substantial enough to render them impermissibly biased.

Most recently, in *Aetna Life Insurance Company v. Lavoie*, 106 S. Ct. 1580 (1986), this Court reaffirmed that a judicial officer with a direct financial stake in the outcome of a case could not sit in judgment on that case. In *Aetna Life*, the Alabama Supreme Court issued a 5-4 decision that clarified a previously unsettled area of the law and upheld an award of $3.5 million in punitive damages. However, one of the parties then discovered that

Alabama Supreme Court Justice Embry, voting in the majority in *Aetna Life*, was a plaintiff in a separate lawsuit that sought compensatory and punitive damages. That suit relied on the same legal theory first approved by the Alabama Supreme Court in *Aetna Life*.

Aetna Life then contended that the Alabama Supreme Court's decision should be overturned because Justice Embry's financial interest in the separate lawsuit denied it the right to an impartial decisionmaker. The Court first rejected the claim that Justice Embry's personal hostility towards insurance companies was sufficiently substantial bias to establish a constitutional violation. 106 S. Ct. at 1585. This Court then found that Justice Embry had a substantial pecuniary interest in reaching the result he did because the decision would favorably affect his pending lawsuit on an identical claim.

The Court distinguished the situation of the other justices of the Alabama Supreme Court, who were only potential class members in Justice Embry's suit. The Court found that although they might have a pecuniary interest in the suit, their interest was too slight and insubstantial to warrant the finding that they were not impartial decisionmakers. 106 S. Ct. at 1588. The Court acknowledged that evaluating the allegedly biasing interests of a decisionmaker involves matters of degree, and the amount of disqualifying bias " 'cannot be defined with precision.' " 106 S. Ct. at 1585 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Instead, bias must be evaluated on a case-by-case basis: "At some point '[t]he biasing influence . . . [will be] too remote and insubstantial to violate the constitutional constraints.' " 106 S. Ct. at 1588 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).

Where the pecuniary interest of the decisionmaker has been less direct, this Court has found that the decisionmaker is less likely to be impermissibly biased. For example, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238

(1980), an assistant regional administrator of the Department of Labor's Employment Standards Administration assessed a fine of $103,000.00 against Jerrico, Inc. The complaining party had an opportunity for a hearing before an administrative law judge, who reduced the fine. Jerrico then brought suit, alleging that this procedure violated the Due Process Clause because of the risk of bias inherent in an employee of the Employment Standards Administration assessing fines that would be used to fund the agency's budget. The Court found that the Due Process Clause was not violated by this procedure for two reasons: first, the assistant regional administrator, in assessing fines, was acting more in a prosecutorial capacity than in a judicial capacity. 446 U.S. at 243. Second, the biasing influence of the eventual receipt of fines by his agency was "too remote and insubstantial" to violate the Constitution. *Id.*

More recently, in *Schweiker v. McClure*, 456 U.S. 188 (1982), this Court upheld, against a challenge under the Due Process Clause, a procedure established by Congress to provide hearings on disputed claims for certain Medicare payments. The hearings were held by employees of private insurance carriers, and claimants did not have a right of appeal. 456 U.S. at 189. The Court first described the appropriate steps to be used in analyzing a claim that the hearing officers were impermissibly biased:

> As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for

> disqualification. But the burden of establishing a disqualifying interest rests on the party making the assertion. 456 U.S. at 195-96 (citations and footnote omitted).

The Court then found that there was no evidence in the record of an actual conflict of interest. The Court stated that "generalized assumptions of possible interest" were insufficient to demonstrate bias. 456 U.S. at 196. The Court then rejected an attempt to add an additional level of de novo review to the procedure established by Congress, stating:

> "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). We have considered appellees' claims in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure. . . ." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair. . . . 456 U.S. at 198.

These cases, read together, set forth standards to be used to evaluate whether a due process violation exists. First, there is a "strong presumption" in favor of procedures established by Congress. *Schweiker v. McClure*, *supra*, 456 U.S. at 198; *see also Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-89 (1985). Second, there is a presumption that decisionmakers themselves are unbiased. *Schweiker v. McClure*, 456 U.S. at 195. Third, the party alleging a due process violation has the burden of presenting substantial evidence of decisionmaker bias. *Id.* Fourth, since due process is a flexible concept, *Morrissey v. Brewer*, 408 U.S. at 481, a determination whether a decisionmaker is

biased will depend on the facts of each case, for not every possibility of interest in the case warrants a finding of a due process violation. *See Aetna Life Insurance Co. v. Lavoie, supra*. In particular, a direct pecuniary interest of the individual decisionmaker is much stronger evidence of an impermissible bias than an indirect institutional interest. *Compare Aetna Life Insurance Co. v. Lavoie, supra, with Marshall v. Jerrico, Inc., supra*, and *Schweiker v. McClure, supra*. Finally, the function of the decisionmaker must be scrutinized to determine whether he or she is acting in a judicial capacity, since the test for decisionmaker bias only applies to adjudicative decisions. *Marshall v. Jerrico, Inc.*, 446 U.S. at 243.

B. The Court Of Appeals Erroneously Concluded That Trustees Are Inevitably Biased.

In the first part of its due process analysis, the court of appeals found that pension fund trustees are impermissibly biased, as a matter of law. Because Yahn raised a facial constitutional challenge to the MPPAA, the court of appeals, quite properly, did not base this conclusion on evidence in the record that the Plan's trustees, or trustees in general, are biased against withdrawing employers. Instead, the court made findings of bias based upon its evaluation of the legal status and duties of trustees. However, the court did not consider all relevant factors in determining whether trustees are biased, but erroneously focused on one allegedly biasing consideration to the exclusion of countervailing factors. A careful reading of the court's analysis reveals that it is fundamentally flawed in its reasoning and in its failure to utilize the correct standards for evaluating the bias of decisionmakers.

The court of appeals correctly recognized that a presumption exists that decisionmakers are unbiased, and that the presumption can be rebutted by a showing of a

conflict of interest. The primary conflict of interest identified by the court was the following: "[A]s fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers." (PBGC JS App. A, 21a). The court held that this alleged conflict was an adequate showing of bias, unless countervailing factors were shown.

The court buttressed its conclusion by finding that the trustees had potential personal liability to the Plan under 29 U.S.C. §1109 (PBGC JS App. A, 22a). The court of appeals misunderstood the extent of their potential personal liability, for it later referred to the trustees' "consequent personal liability if the plan is not adequately funded. . . ." (PBGC JS App. A, 24a). Of course, trustees are not personally liable merely because the plan is not fully funded; liability only attaches if the trustees breach their fiduciary duties. *See* 29 U.S.C. §1109(a).

What apparently underlies the cout of appeals' statements about the personal liability of plan trustees is its belief that trustees face the possibility of being held personally liable to the plan if they do not assess the maximum withdrawal liability against employers. The leg,slative history of the MPPAA reveals that this concern is groundless. The House Report specifically states that an assessment of less than the maximum possible withdrawal liability is *not* a breach of fiduciary duty:

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund. *The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not per se a violation of a fiduciary standards;* the determination must be

> made as to whether the fiduciary has acted reasonably and in the interest of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards. H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 67 (1980) (emphasis added).

Thus, trustees do not face personal liability for failure to maximize withdrawal liability. Their judgments as to withdrawal liability are evaluated with the deferential "arbitrary and capricious" standard used to evaluate decisions concerning the fund. *See* pages 27-29 *infra*. The court of appeals erred in determining that trustees are biased by the fear of potential personal liability.

The court's finding that trustees are biased by a supposed duty to the fund to maximize withdrawal liability was also erroneous. In fact, trustees must consider many different, competing factors in assessing withdrawal liability, as Congress found in the passage quoted above. The overriding purpose is *not* to assess the maximum withdrawal liability, but to choose the course of action that is in the best interests of the fund. As the Court of Appeals for the First Circuit held in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1985) (en banc), trustees "would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." 762 F.2d at 1142-43. Instead, Congress has directed that trustees must consider all relevant factors and "develop an allocation method which meets the basic purpose of withdrawal liability *and is equitable to contributing employers*." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 73 (1980) (emphasis added). Thus, it is the fiduciary duty of trustees to be equitable to employers and consider what assessment is best for the plan.

The court of appeals dismissed this showing by stating: "The due process right to an unbiased

decisionmaker is not satisfied by speculation that countervailing concerns may restrain clearly biased parties from excessively harsh judgments." (PBGC JS App. A, 23a) (footnote omitted). This statement is internally inconsistent with the court's earlier statement that trustees were considered biased because of their duty to maximize withdrawal liability "[a]bsent countervailing factors." (PBGC JS App. A, 21a). More importantly, it is incorrect to discount a factor showing a lack of bias; the proper approach is to consider whether all relevant factors amount to evidence sufficient to rebut the presumption of lack of bias.

If all factors concerning the trustees' interests are evaluated, the conclusion is evident that trustees are not impermissibly biased against withdrawing employers. Initially, it is important that the trustees do not have any *personal* interests that would render them biased.[12] Instead, they have only *institutional* interests based upon their duty of loyalty to the plan. As Congress found, in

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12. For this reason, the court of appeals' reliance, *see* PBGC JS App. A, 23a-24a, on *Gibson v. Berryhill*, 411 U.S. 564 (1973), and on certain language in *Friedman v. Rogers*, 440 U.S. 1 (1979), is misplaced. Those decisions concerned allegations that decisionmakers had personal, financial stakes in the outcome of cases before them. Pension plan trustees do not have any personal, financial stakes in the determination of withdrawal liability.

The court of appeals also relied upon *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), as supporting its decision. While *Ward* affirms the right to an impartial decisionmaker established in *Tumey v. Ohio*, *supra*, its holding does not control this case. In *Ward*, the mayor of Monroeville sat as a judge of ordinance violations and traffic offenses, with the power to adjudge guilt and levy fines on defendants. The mayor also had executive responsibility for village finances, and the revenues derived from the fines, costs and fees assessed in the mayor's court were a "major part" of the village's income — close to 50%. 409 U.S. at 58. Thus, the mayor had an unequivocal bias, with no countervailing interests, in favor of convicting criminal defendants and assessing the maximum possible fines. Pension plan trustees, by contrast, do not have an unequivocal interest in assessing the maximum withdrawal liability.

the passage quoted above, the plan's interests include encouraging new entrants, easing administrative burdens, and protecting the fiscal integrity of the plan. These interests are served by being equitable to employers, as Congress suggests, because an equitable plan would attract new contributors, and equitable assessments would minimize the amount of challenges, and resulting litigation, brought by withdrawing employers against their assessments. Finally, if the plan provides for equitable withdrawal liability assessments, then employers will be less likely to seize upon the first opportunity to withdraw from a plan. In sum, the institutional interests of plan trustees do not require them to be biased against withdrawing employers.

When considered in light of the procedural due process principles established by this Court, the interests of trustees are insufficient to render them impermissibly biased decisionmakers. The trustees do not have disqualifying personal loyalties, but only institutional loyalties that are required by Congress. The trustees are not obligated to maximize withdrawal liability, but to make equitable assessments. It follows that the court of appeals erred in finding that trustees are inevitably biased against withdrawing employers,[13] given the "strong presumption" in favor of procedures established by Congress, *Schweiker v. McClure*, 456 U.S. at 200, and the presumption that decisionmakers are unbiased. *Id.* at 195.

C. Multiemployer Pension Plan Trustees Do Not Act As Adjudicative Decisionmakers When They Calculate Withdrawal Liability.

As this Court recognized in *Marshall v. Jerrico, Inc.*, *supra*, a functional analysis of the decisionmaker's role is

13. Of course, withdrawing employers are free to show, in individual cases, that the trustees were impermissibly biased against them.

necessary because only quasi-judicial or adjudicative decisions can be challenged as impermissibly biased. The court of appeals found that three different types of decisions made by the trustees were subject to their allegedly disabling bias: the choice of an allocation method, the choice of actuarial assumptions, and the decision to grant any of the statutory exemptions. However, these decisions are not adjudicative in nature. In making each of these decisions, the trustees' discretion is either severely limited or subject to independent review, so that any bias that does exist is irrelevant.

The trustees choose an allocation method by either selecting one of four methods prescribed by Congress in the MPPAA or using a method of their own design, which must be approved by the PBGC. If the trustees do not select a method, then they must use the "basic" or "presumptive" method, which is the method used by the trustees in this case. Once a method is selected, the trustees must apply it uniformly to all withdrawing employers. The trustees cannot change the allocation method to be used for a specific withdrawal: unless the employer consents, the plan must use the method in effect on the date of the withdrawal. *See* 29 U.S.C. §1394(a); H. R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 85 (1980). As Judge Seitz noted in his dissent in the court of appeals: "Thus, when Yahn withdrew from the pension plan, the trustees simply had no choice about which method to employ: either the method specified by amendment, or — if the plan was never amended — the presumptive method." (PBGC JS App. A, 36a).

The choice of allocation method is not the type of decision contemplated by the due process analysis. First, this decision is legislative in nature, not adjudicative, because the allocation method is a rule chosen to apply to all withdrawing employers and cannot be changed on a case-by-case basis. The impartial decisionmaker requirement does not apply to this sort of legislative function. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982);

Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); *see also* PBGC JS App. A, 36a (Seitz, J., dissenting). Surely the Due Process Clause would not be violated if the mayor of Monroeville promulgated an executive order, applicable to all future violators, that set high fines for traffic violations, even if the mayor's purpose was to maximize village revenues.

Second, the scope of the discretion exercised by the trustees in selecting an allocation method is too narrow to raise due process concerns. Trustees can ony choose one of four methods prescribed by Congress. It is not disputed in this case that those methods are fair. If the trustees design their own method, that method must be approved by an impartial third party, the PBGC. The real decisionmaker in designing allocation methods is an impartial one, not the trustees. Due process is not violated merely because the trustees may choose which of several fair methods is to be used.

The second type of decision found by the court of appeals to be influenced by bias is the choice of actuarial assumptions used for actually calculating the withdrawal liability. That choice, however, is made by the plan's actuary, which is a neutral decisionmaker, governed by ethical and professional standards. The assumptions selected by the actuary must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a). There is no reason to believe that plan actuaries in general, or this Plan's actuary, Peat, Marwick, Mitchell & Co., would be biased against either withdrawing employers or any particular withdrawing employer. Obviously, the withdrawing employer would be free to make that showing in a particular case, but for the purpose of facial constitutional analysis, pervasive or institutional bias on the part of actuaries cannot be shown to exist.[14]

14. Although trustees are not bound to accept assumptions recommended by the actuary, the fact that the trustees rejected their own actuary's recommendations would be powerful evidence in an

An arbitrator's deference to the reasonable decisions of the plan's actuary does not violate the Due Process Clause. Because the actuarial assumptions selected by the actuary are based upon "the actuary's best estimate of anticipated experience under the plan," the actuary must take into account a complex series of factors concerning the plan, such as the available data concerning plan participants, anticipated rates of return on the plan's investments, the plan's investment policy, and the actuary's projection of economic conditions. Obviously, the plan's actuary is in the best position to assemble the relevant information and assess these factors. By its very nature, the determination of actuarial assumptions is a "best estimate," and another actuary might reach a different estimate. The estimations inherent in setting actuarial assumptions can be second-guessed, as economic projections cannot be conclusively proven. *See Senate Labor Summary* 20-21. The MPPAA merely recognizes that in this situation, the estimate of the plan's actuary is the most reliable and accurate, as long as it is reasonable. The Due Process Clause is not violated because deference is given to the reasonable judgments of the person in the best position to make them.

The third type of allegedly biased decision made by trustees is whether any of the statutory exemptions apply. The court of appeals found that the trustees' supposed bias would affect their decision to find a withdrawing employer exempt. Even assuming, *arguendo*, this is true, the bias would be meaningless because decisions as

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arbitration hearing that the assessment of withdrawal liability was unreasonable. *See Keith Fulton*, 762 F.2d at 1141 n.3 (citing *Woodward Sand Co. and Operating Engineers' Pension Trust*, 3 EBC (BNA) 2351 (1982) (Kaufman, Arb.)); PBGC JS App. A. 38a & n.3. As a practical matter, the trustees are likely to follow the actuary's recommendation or risk having the assessment overturned as unreasonable by an arbitrator.

to the applicability of statutory exemptions would be reviewed de novo. The PBGC has concluded that legal determinations made by the trustees are not presumed correct in arbitration. PBGC JS at 21. The Plan agrees with the PBGC that the presumption of correctness in Section 1401(a)(3)(A) does not apply to legal questions decided by the trustees.[15] Thus, to the extent that the court of appeals relied upon the trustees' alleged bias in applying statutory exemptions to find Section 1401(a)(3)(A) unconstitutional, the court of appeals erred.

D. The Presumption Of Correctness Accorded To Trustees' Assessments Of Withdrawal Liability Is Consistent With The Arbitrary And Capricious Standard Used To Evaluate Decisions By Trustees.

The foundation of the court of appeals' finding of a due process violation is that it is inappropriate to accord a presumption of correctness to the decision of trustees because they are not neutral and detached. Instead, the court of appeals would have trustees' withdrawal liability assessments reviewed de novo. However, the standard of review at issue in this case is the conceptual equivalent of the well-established arbitrary and capricious standard used to evaluate all trustees' decisions concerning a pension plan.

When it enacted ERISA, Congress did not explicitly specify the standard of review to be used to evaluate decisions made by trustees of ERISA funds. This Court has recognized that Congress intended to invoke and adopt

15. *Cf. Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984) (under the arbitrary and capricious standard, trustees' decisions on questions of law can be overturned if simply "erroneous"), *cert. denied*, 469 U.S. 1189 (1985); *Washington Post v. Washington-Baltimore Newspaper Guild, Local 35*, 787 F.2d 604, 606 (D.C. Cir. 1986) (despite deference normally given to decisions of labor arbitrators, their decisions on questions of statutory construction are reviewed de novo).

the common law of trusts to define the powers and duties of trustees. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 105 S. Ct. 2833, 2840 (1985). Although this Court has not specifically addressed the question, the lower federal courts unanimously agree that as part of its adoption of the common law of trusts, Congress intended that trustees' decisions would be evaluated under the deferential "arbitrary and capricious" standard. *See Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986); *Jestings v. New England Telephone and Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Bueneman v. Central States, Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d 575, 576 (10th Cir. 1981); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1530-31 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 410 (1985); *see generally* Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033 (1985).

Under the arbitrary and capricious standard, as with the standard for reviewing withdrawal liability assessments, there is no opportunity for a de novo hearing. *See, e.g., Wardle v. Central States, Southeast and Southwest*

Areas Pension Fund, 627 F.2d at 824; *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d at 576; *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d at 336. Like the decisions of an administrative agency, the decisions of trustees receive limited review, "taking into account the expertise of professionals operating in a complex field. Courts will substitute their judgment for that of trustees only if the trustees' actions are not grounded on any reasonable basis. Choices between reasonable alternatives, it follows, are for the trustees, not the courts." *Stewart v. National Shopmen Pension Fund*, 795 F.2d at 1083. "[T]he standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry v. Ciba-Geigy Corp.*, 761 F.2d at 1006.

Although the Section 1401(a)(3)(A) standard is described differently from the arbitrary and capricious standard, the two standards are essentially equivalent. Both standards presume that the trustees' decisions are correct and place the burden of proof on the objecting party. Both standards require a reviewing court to uphold the choices of the trustees between reasonable alternatives. Finally, under both standards the trustees are permissibly "biased", *i.e.*, their decisions are controlled by their duty of loyalty to the plan.

The point of demonstrating that the two standards are fundamentally equivalent is this: it is beyond dispute that the well-established arbitrary and capricious standard does not violate the due process rights of persons challenging plan decisions, such as a denial of an application for benefits from the fund. Plan beneficiaries do not receive a hearing before an impartial decisionmaker, and yet their entitlement to important property rights, such as pension rights, can be adjudged without any right to de novo review of that decision. In both situations, the partiality of the trustees does not constitute a

due process violation because whatever bias exists is a permissible type of bias.

The bias of the trustees is permissible because the trustees are obligated by Congress to be biased in favor of pension plans. This "bias" mirrors the "bias" of the MPPAA. The primary concern of Congress in enacting the MPPAA was to insure the financial soundness of multiemployer pension plans and alleviate the problem of employer withdrawal from those plans. *See Connolly v. PBGC*, 106 S. Ct. 1018, 1020-22 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). While the effect of the MPPAA is to benefit multiemployer plans at the expense of withdrawing employers, this Court has held that the MPPAA is not, for that reason, unconstitutional. *Connolly*, 106 S. Ct. at 1024-26. By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for what is at issue is what is best for the plan. Put another way, the alleged "bias" of the trustees is identical to the "bias" of Congress in enacting the MPPAA and the "bias", or purpose, of the statute itself — namely, to insure the integrity of pension plans. The procedure for assessing withdrawal liability effectuates Congress' purpose in enacting the MPPAA by deferring to decisions of the persons best able to judge what is best for the plan. In short, because the MPPAA and the assessment of withdrawal liability are intended to serve pension plans, the trustees' loyalty to those plans is not an *impermissible* bias.

Moreover, the presumption of correctness attached to trustees' decisions is not unique. An analogous presumption exists in the field of labor law. A union's decision not to process a member's grievance to arbitration is not reviewed de novo. Instead, the union's decision that the grievance lacked merit is presumed correct and can only be challenged if the member can show that the

union acted arbitrarily, discriminatorily, or in bad faith in refusing to press the grievance. *See Vaca v. Sipes*, 386 U.S. 171, 190-94 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). This Court has repeatedly reaffirmed the validity of the *Vaca v. Sipes* standard, *see Clayton v. United Automobile Workers*, 451 U.S. 679 (1981); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), without a suggestion that the member's due process rights might be violated by deferring to the union's decision. As with decisions by pension fund trustees, courts defer to the decisions of unions because that deference effectuates important federal policies, namely, those that favor the resolution of labor-management disputes through grievance and arbitration procedures and the primary responsibility of the collective bargaining representative to negotiate and resolve those disputes. *See Vaca v. Sipes*, 386 U.S. at 191-94. Similarly, the presumption of correctness given to decisions by plan trustees promotes federal policies that favor the fiscal integrity of pension plans and disfavor judicial interference into the management of those plans.

In addition to their role in promoting federal policies, these presumptions of correctness — the arbitrary and capricious standard, the *Vaca v. Sipes* standard, and the standard applicable to withdrawal liability assessments — are all constitutional because they are only evidentiary presumptions. The presumptions merely place the burden of proof on a particular party and establish the legal standard that must be satisfied by that party. These presumptions are constitutional because the burden of proof can be satisfied and the presumptions can be rebutted. Withdrawing employers receive due process because they do have the opportunity for hearings in which they can prevail if they satisfy their burden of proof. The mere fact that a particular burden is placed on them does not violate the Constitution.

E. The Court of Appeals' Ruling That Assessments Of Withdrawal Liability Are To Be Determined De Novo By An Arbitrator Would Threaten The Financial Stability Of Pension Funds.

The court of appeals' solution to the defect it perceived in the MPPAA was to rule that arbitrators should decide the proper amount of withdrawal liability de novo. As Judge Seitz noted in dissent, this decision "is an open invitation to proliferated and expanded arbitration proceedings." (PBGC JS App. A, 35a). A problem of this magnitude cannot be lightly disregarded. Withdrawing employers who object to their assessments of liability will be able to force a lengthy hearing on the proper determination of withdrawal liability. The arbitrator will need to be educated about every aspect of the fund in order to understand the plan's withdrawal liability requirements. For example, because actuarial assumptions are supposed to "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. §1393(a), the arbitrator would have to be informed of the plan's entire experience. To present its case, each side would have to hire experts and incur large attorneys' fees. The plan would then be subject to an arbitrator's independent determination of withdrawal liability.

In addition to the immediate and substantial costs of the arbitration hearing, there is no guarantee that an arbitrator considering the assessment of a second withdrawing employer will make an assessment that is consistent with the first arbitrator's decision. As a result, the plan may lack the consistency and predictability that is essential to good financial management.

The inevitable result of this change in procedures is to harm the financial soundness of multiemployer plans, contrary to the will of Congress in enacting the MPPAA. Withdrawing employers will be able to use the threat of lengthy, costly arbitration hearings to force plans to accept smaller withdrawal liability assessments than they

would be entitled to receive. If the plans choose not to accept such low settlement offers, they would "be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Senate Labor Summary* at 21 (quoted in *Keith Fulton*, 762 F.2d at 1143 n.7). Congress found that the presumption of correctness was "necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 86 (1980). The court of appeals' decision would eviscerate the protections designed by Congress to assist multiemployer plans, with little, if any, corresponding legitimate benefit.

CONCLUSION

The decision of the court of appeals that Section 1401(a) (3) (A) violates the Due Process Clause should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., AND THE PENNSTAR COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Can Congress, consistent with the Due Process Clause of the Fifth Amendment, give a "presumption of correctness" to a private party's determination of another private party's liability where the favored party has a legal duty and personal interests that conflict with a neutral and detached determination?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-231, 86-253

PENSION BENEFIT GUARANTY CORPORATION,

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,

Appellants,

v.

YAHN & MCDONNELL, INC., AND THE PENNSTAR COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

A. Statutory Background

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA" or "the Act"), 29 U.S.C. §§ 1381-1461 (1982 & Supp. II 1984), an employer who "withdraws" from a multiemployer pension plan must pay a portion of the plan's unfunded vested benefits. Such plans are set up through collective bargaining agreements between employers and labor unions. *See* Labor-Management Relations Act of 1947, § 302(c), 29 U.S.C.

§ 186(c) (1982). Employers typically make contributions at a fixed rate specified in the collective bargaining agreement and have no contractual obligation for benefits beyond that commitment.[1] Decisions regarding benefit levels and criteria are vested in the trustees of the plan, and the individual employer typically has no control over those decisions.[2] The liability imposed by the MPPAA is thus noncontractual and arises solely by operation of statute. As the Seventh Circuit stated: "Liability under the MPPAA is not a contractually or pri-

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[1] Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214*, at 2-3 (July 1, 1978): "In most instances an individual employer's obligation to contribute to the plan and its involvement with the plan has been limited to making the contributions required under the collective bargaining agreement regardless of whether those contributions prove sufficient to provide the benefits established by the joint board." *See also* United States Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* at 15 (1985):

> The distinguishing characteristic of defined benefit multiemployer plans is that the collective bargaining agreement typically provides for the individual employer in the plan to contribute a specified amount of money to a central fund on the behalf of employees. Determination of the benefits is left to the discretion of a joint employer-union board of trustees.

[2] *See Sinai Hospital of Baltimore* v. *National Benefit Fund*, 697 F.2d 562 (4th Cir. 1982) (provision in collective bargaining agreement limiting increase in benefits not bar to trustees' increase); *NLRB* v. *Local 582, International Bhd. of Teamsters*, 670 F.2d 855 (9th Cir. 1982) (refusal by employers to agree to specific benefit in collective bargaining did not preclude multiemployer welfare fund from granting benefit).

The Trust Agreement for the Central States, Southeast and Southwest Areas Pension Fund ("Central States Fund")—the largest multiemployer pension plan—is typical in its express limitation of an employer's control and responsibility for the actions of the trustees: "Upon transfer of each contribution to the Trustees, all responsibilities of the Employers for such contributions shall cease, and the Employers shall have no responsibilities for the acts of the Trustees." Revised and Amended Trust Agreement, art. XIV, § 1.

vately created burden, rather it is imposed by law . . . ." *Peick* v. *PBGC*, 724 F.2d 1247, 1277 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). *See generally Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring). The amount of the liability can exceed the employer's net worth.[3]

The determination of withdrawal liability is given in the first instance to the pension plan. 29 U.S.C. § 1382 (1982).[4] To calculate liability, the plan must determine whether a withdrawal has occurred and then allocate to the employer a portion of "unfunded vested benefits," *id.* § 1381(b) (1982); *i.e.*, the difference between the present value of the pension fund's assets and its future vested payout obligations. *Id.* § 1393(c) (1982). Determining unfunded vested benefits requires numerous actuarial assumptions concerning such matters as mortality, retirement ages or rates, expenses, investment return, and withdrawal rates. 9 Pension Reporter (BNA) No. 396, at 814 (June 7, 1982). *See generally* D. McGinn, *Actuarial Fundamentals for Multiemployer Plans* 25-31 (1982).

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[3] *See* Interview with Arthur H. Bunte, Jr., Employer Trustee of Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, in *1985 Annual Report of the Trustees* at 8: "Deregulation [of the trucking industry] severely threatened weaker companies. Many of them couldn't afford to sell or go out of business because their withdrawal liability . . . often was greater than [their] assets."

[4] Section 1382 states:

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

The Act permits a pension plan to use its own assumptions so long as they "in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1393(a)(1) (1982). Complete data are not required in making these determinations:

> [T]he plan actuary may . . . in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

Id. § 1393(b)(2).

Once the plan determines the employer's allocated portion of unfunded vested benefits,[5] it must then determine whether one of a number of statutory exemptions reduces or eliminates the liability. The plan then notifies the employer of the amount of the assessment.

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[5] The statute prescribes four methods for allocating unfunded vested benefits: the presumptive method, the modified presumptive method, the rolling five method, and the direct attribution method; the plan determines which to use. 29 U.S.C. § 1391 (1982). The first three methods assign the employer a portion of unfunded vested benefits based on the ratio of the employer's previous contributions to the total contributions. The direct attribution method, which is little used by pension funds, assigns the employer the unfunded vested benefits of his own employees plus a portion of the unfunded vested benefits of other employers' employees.

Under the first three methods, there is no necessary connection between the amount of withdrawal liability and the amount necessary to fund the benefits for the employer's own employees; withdrawal liability therefore often goes to support the benefits of other employers' employees. Indeed, withdrawal liability is assessed even if an employer's previous contributions were sufficient to fund completely the vested benefits of the employer's own employees. *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings on S.1748 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 57 (1982) (statement of James H. Hunt, President, Bangor Punta Marine); *id.* at 75 (statement of Dennis L. Hansen, Secretary and Treasurer, Ramsey Winch Company).

If the employer disputes certain of the plan's factual determinations, he must take the dispute to arbitration. In arbitration, the plan's findings of fact are presumed correct:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(a)(3)(A) (1982). In addition, the plan's actuarial assumptions and methods for determining unfunded vested benefits are to be presumed correct. *Id.* § 1401(a)(3)(B). These presumptions carry over into a review by a federal district court, where "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Id.* § 1401(c).

B. Factual Background

Appellee Yahn & McDonnell, Inc. ("Yahn") renewed in December 1980 its collective bargaining agreement with Teamsters Union Local 115 ("the Union"). Under the terms of that and prior agreements,[6] Yahn agreed to make specified weekly contributions to the Union's ERISA pension plan, appellant United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"), on behalf of all Yahn employees represented by the Union.

As is typical of such agreements (*see* notes 1-2 *supra* and accompanying text), Yahn's contractual obligation was limited to making the specified contributions, and the agreement itself did not provide for the imposition of

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[6] The basic agreements were negotiated by a multiemployer bargaining group, the Philadelphia Association of Tobacco and Confectionary Distributors, of which Yahn was a member.

withdrawal liability. *See* JS 6a.[7] As is also typical, the individual employer had no control over the administration of the Plan: "The Pension Plan shall be administered solely by the Trustees, and the decisions of the Trustees in all matters pertaining to the administration of the Pension Plan shall be final." United Retail and Wholesale Employees Union Local No. 115 Joint Pension Plan, art. VIII, § 8.1 (as amended & restated Jan. 1, 1976).

Yahn ceased operations in November 1981, thereby "withdrawing" from the Plan within the meaning of the MPPAA. The Plan demanded withdrawal liability totalling $457,779, an amount almost double the company's contributions for the years 1976-1980.[8] The Plan informed Yahn that the Plan would look to Yahn's parent company, appellee The Pennstar Company ("Pennstar"), for payment if Yahn could not pay. JS 7a. Yahn requested review of the assessment pursuant to the statute, *see* 29 U.S.C. § 1399(b)(2) (1982), and the trustees refused to alter the assessment after conducting the review. Yahn demanded arbitration, and the parties agreed to hold arbitration in abeyance pending resolution of the constitutional issues. JS 7a.

In April 1983, the Plan brought suit in the District Court for the Eastern District of Pennsylvania against Yahn seeking a withdrawal liability payment. *Id.* In addition to certain statutory arguments not relevant here, Yahn defended on the basis that the MPPAA de-

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[7] References in this brief to appellant Pension Benefit Guaranty Corporation's ("PBGC") Jurisdictional Statement and accompanying appendix will be cited "JS ——"; references to appellant PBGC's Brief on the merits will be cited "PBGC Brief at ——"; references to the appellant Plan's Brief on the merits will be cited "Plan Brief at ——".

[8] Yahn made all required contributions under the contract and contributed over $260,000 for the years 1976-1980. *See* Appendix A hereto, at 10a (Plan's calculation for Yahn's withdrawal liability).

nied it due process. The district court granted summary judgment against Yahn and held that the MPPAA does not violate procedural due process. The court below reversed, concluding that "because the trustees are biased and have significant discretion, and because their determination of liability is deferentially reviewed in arbitration and in district court, we believe MPPAA deprives employers of their constitutional right to a fair hearing." JS 28a. The court further concluded that declaring unconstitutional the presumption in section 1401(a)(3)(A) rescued the statutory framework's constitutionality. *Id.* 32a-33a.

SUMMARY OF ARGUMENT

The court below declared unconstitutional section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982). The decision eliminates a critical element of unfairness from the procedures mandated by the MPPAA for the resolution of the withdrawal liability assessments made by multiemployer pension plans. Congress for reasons of "efficiency" expressly sought to limit employers' ability to defend against such assessments by insulating them through a presumption of correctness. The Act thus places extraordinary decisionmaking power in the hands of a private party with statutory duties and individual interests that are inconsistent with an impartial determination.

The Act's procedural requirements obstruct an employer's ability to obtain a fair, impartial, and objective assessment of his liability. The initial determination is given to the party that will receive the money, the pension fund. The fund trustees have a statutory duty to act solely in the interests of the fund's beneficiaries, and are subject to lawsuit if they fail to do so. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); 29 U.S.C. § 186(c)(5) (1982); 29 U.S.C. § 1132 (1982). The trustees are private parties, not appointed by the

government nor directly regulated by the government in the withdrawal liability determination. Half the trustees represent employers staying in the fund, whose economic interests conflict with employers withdrawing from the fund, because the more money "stayers" collect from the "withdrawers," the more the "stayers" reduce their own future liabilities. The other half of the trustees represent the union, whose interest is in obtaining the most money from withdrawing employers for the benefit of the employees they represent. This partisan representation is legally mandated. *See* 29 U.S.C. § 186(c)(5) (1982).

The statute gives the trustees broad discretion to put this systemic bias into effect. The trustees have the power to determine whether statutory exemptions and definitions apply, choose the actuary who will develop the actuarial assumptions to be used in calculating liability, and oversee the actuary's decisions.

The trustees' decision is then shielded in the review process, where the determination resulting from systemic bias is presumed correct both before the arbitrator and in subsequent judicial review. The express purpose of the presumption is to limit an employer's ability to defend himself and aid an outcome favorable to the pension fund.

The system does not provide either "a neutral and detached judge in the first instance," *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972), or *de novo* review by an impartial and distinterested tribunal, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). The Act violates both the reality and the appearance of justice guaranteed by the due process clause.

ARGUMENT

I. THE TRUSTEES OF THE PLAN ARE INSUFFICIENTLY "NEUTRAL AND DETACHED" TO PERMIT THEM DECISIONMAKING POWER OVER AN EMPLOYER'S WITHDRAWAL LIABILITY.

Due process requires an impartial decisionmaker: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1927). The principle is deeply rooted in Anglo-Saxon jurisprudence. The Magna Charta had a number of provisions designed to protect against tribunals biased in favor of the King. *See* Magna Charta ¶¶ 18, 19, 24, 38, 39, 45, 52, *reprinted in* 1 Del. Code Ann. at 1, 4-7 (1975).[9] English jurists consider the right to an unbiased decisionmaker one of the two elements of "natural justice." Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1269 n.10 (1975). Blackstone held that "tyrranical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office" constituted a "crime of deep malignity." 4 W. Blackstone, Commentaries *140. Judge Friendly concluded that this Court's cases establish an unbiased tribunal as one of the three minimum criteria for due process. 123 U. Pa. L. Rev. at 1278-79.

In determining whether a decisionmaker is biased, there initially is a presumption of impartiality. *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The presumption "can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

To rebut the presumption, the appellees here need only show that the decisionmaker is potentially subject to such

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[9] For example, paragraph 24 of the Magna Charta provides: "No sheriff, constable, coroner, or other [of] our bailiffs, shall hold pleas of the Crown." Paragraph 45 provides: "We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it."

disqualifying interests, not that the decisionmaker was actually biased.[10] *Aetna Life Ins. Co.* v. *Lavoie*, 106 S. Ct. 1580, 1587 (1986) (Court not required to decide whether decisionmaker "in fact . . . was influenced" by possible temptation to bias); *In re Murchison*, 349 U.S. 133, 136 (1955) (no need to show "actual bias"). Disqualifying interests can be pecuniary, *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Tumey* v. *Ohio*, 273 U.S. at 523, or can occur where the combination of statutory duties with the quasi-judicial function may create the "possible temptation" for the decisionmaker to render his decision for partisan reasons, *see Ward* v. *Village of Monroeville*, 409 U.S. at 60.

Pension plan trustees determine in the first instance an employer's withdrawal liability. That determination cannot be presumed impartial under the application of the foregoing principles. The trustees are private parties with both statutory and individual interests that conflict with an unbiased determination of withdrawal liability.

A. The Trustees Are Biased as a Matter of Law.

As noted by the court of appeals, "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)(a), and thus owe an *exclusive* duty to the fund." JS 22a (emphasis in original). This Court emphasized in *NLRB* v. *Amax Coal Co.*, 453 U.S 322, 329-30 (1981) (citations omitted):

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all tempta-

[10] Because the question is the existence of systemic disqualifying interests, not actual bias in the individual case, evidence from pension funds other than the party in this case appropriately can be considered to show the kinds of pressures that can affect trustees and to illustrate other aspects of the statutory scheme. This brief therefore presents such material where it may aid the Court in assessing the statute.

> tion and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

The trustees' fiduciary duty under ERISA is "'*more* exacting [than] the requirements of the common law of trusts relating to employee benefit trust funds.'" *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. 3085, 3098 n.17 (1985) (Brennan, J., concurring) (emphasis in original) (quoting *Donovan* v. *Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)). Senator Williams, a co-sponsor of both ERISA and the MPPAA, emphasized that ERISA imposes "strict fiduciary obligations on those who exercise management or control over the assets or administration of an employee pension or welfare plan." 120 Cong. Rec. 29,929 (1974). Trustees are personally liable to the fund for breach of these "strict fiduciary obligations." 29 U.S.C. §§ 1109, 1132 (1982); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. at 3098-90 & n.8.

This legal framework ensures that trustees exercise every effort to maximize the assets available to a pension plan, including decisions regarding withdrawal liability. The legislative history demonstrates that Congress expected pension plans, in enforcing the withdrawal liability provisions, to act as ordinary litigants concerned with "maximizing the total ultimate recovery":

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs.[11]

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[11] 126 Cong. Rec. 23,288 (1980) (statement of Senator Williams, MPPAA co-sponsor).

Congress thus contemplated that plan trustees, as a consequence of their fiduciary duties, would act to maximize liability.[12] Individuals with such statutory duties cannot be presumed impartial in making quasi-judicial decisions. *See Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982).

While Congress did state that failure to maximize withdrawal liability is not a per se violation of fiduciary duty,[13] the very fact that it can be a violation at all renders the trustees' decision something other than "neutral and detached." This Court has concluded that fear of lawsuit can improperly interfere with judicial decisionmaking. *Stump* v. *Sparkman*, 435 U.S. 349, 363-64 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 646, 649 (1872). By the same token, a private party that *is* subject to lawsuit for his decisions cannot be presumed to act without considering the personal consequences.

The appellants argue that trustees in some instances may deem a reduction of liability in the fund's interest. PBGC Brief at 33-34; Plan Brief at 21. The constitutional standard is impartiality, however, and the speculative possibility that systemically partial trustees may nonetheless sometimes reduce liability does not meet that standard. As the court of appeals concluded, the speculation that "manifest bias will not always result in gross injustice to employers" does not save the statutory scheme:

> "It seems an odd principle to determine the permissibility of manifest bias by weighing the decision-

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[12] The appellant Plan, though arguing that trustees are not "inevitably biased," Plan Brief at 19, acknowledges that "trustees are obligated by Congress to be biased in favor of pension plans," *id.* at 30.

[13] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

maker's conflicting interests in the scale of justice and finding which side predominates." [14]

All else being equal, more money is better than less money when viewed from the perspective of the trustees' statutory duty. This statutory interest conflicts with a neutral determination of employer withdrawal liability.

B. The Trustees of a Pension Plan Have Individual Interests Inconsistent with a Neutral and Detached Determination.

By law, employers and employees must be "equally represented" in the administration of the pension fund. 29 U.S.C. § 186(c)(5) (1982). The dual role of both employer and employee trustees has inherent conflicts that preclude impartial withdrawal liability determinations.

1. *Employer Trustees.* Employer trustees necessarily represent companies who are not withdrawing from the fund. Because any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw, representatives of the staying companies have a conflicting pecuniary interest when they determine the liability of a withdrawing employer. That pecuniary interest should bar a statutory role as decisionmaker. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

The PBGC itself has acknowledged that the interests of staying employers are "materially different" from those of withdrawing employers. In responding to comments on its proposed arbitration provisions, the PBGC rejected a commenter's suggestion that arbitrators be

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[14] JS 23a (quoting *Keith Fulton & Sons, Inc.* v. *New England Teamsters Pension Fund, Inc.*, 762 F.2d 1137, 1149-50 (1st Cir. 1985) (Aldrich, J., dissenting)).

"preselected" before the initiation of arbitration. The PBGC stated that "the arbitrator would, in practice, almost always be imposed unilaterally by the plan sponsor [*i.e.*, plan trustees], a result entirely contrary to the PBGC's mandate to devise 'fair and equitable' procedures." 50 Fed. Reg. 34,679, 34,680 (1985). The PBGC further stated: "[T]here is no feasible means by which an arbitrator could be preselected by representatives of both the plan sponsor and the employers that will withdraw in the future (*whose interests are materially different from those of the employers who will not withdraw*)." *Id.* (emphasis added).

The PBGC's finding rebuts the Plan's claim that "trustees do not have any personal, financial stakes in the determination of withdrawal liability." Plan Brief at 22 n.12. The PBGC has already recognized that employer trustees have interests materially different from withdrawing employers, and recognized that these interests preclude employer trustees from making decisions implicating the fairness of the procedures under the MPPAA.

2. *Employee Trustees.* Employee trustees typically are leaders of the union that sponsors the pension plan. As such, the union trustees have every interest in obtaining the maximum amount of money for the benefit of their members from the non-withdrawing employer and no interest in treating neutrally the company that will no longer be employing those members. Moreover, union trustees have an adversarial, and sometimes antagonistic, relationship with the employers with whom they deal.

Here, for example, one of the two union trustees is John P. Morris, who at all material times also has served as Secretary-Treasurer of Local 115.[15] Mr. Morris signed

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[15] The other union trustee, James Smith, appears to be subordinate to Mr. Morris within Local 115. *See Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 3 (1986).

on behalf of Local 115 the collective bargaining agreement with Yahn in 1980 that subsequently served as the basis for the imposition of withdrawal liability. Mr. Morris is also president of Teamsters Joint Council 53 and "is widely regarded as the most powerful union leader in Pennsylvania."[16]

Mr. Morris has held his position with Local 115 for a number of years. *See Fuchs* v. *Local 115, International Bhd. of Teamsters*, 427 F. Supp. 742, 744 (D. Conn. 1977); *Samoff* v. *Teamsters Local 115*, 338 F. Supp. 856, 862 (E.D. Pa. 1972).[17] Under Mr. Morris' leadership, the local's activities have involved the confrontational, combative, and sometimes bitter relations with employers not uncommon in the union-management arena, especially in the trucking industry. *See, e.g., Samoff* v. *Teamsters Local 115*, 338 F. Supp. at 861 (unlawful recognitional picketing by Local 115 "accompanied by threats, epithets and violence directed to the Company's management"); *Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 2-4 (1986) (strike and unfair labor practice charges by Local 115 over employer failure to pay Christmas bonus); *Teamsters Local Union No. 115*, 224 N.L.R.B. 388 (1976) (unlawful recognitional picketing after decertification by company employees).

Perhaps Mr. Morris can put aside a lifetime of adversary relations with employers and become "neutral and detached" when making decisions as a trustee relating to employer withdrawal liability. But there is no basis for presuming so. The "possible temptation" to act for partisan reasons is the relevant inquiry. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972). Such a

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[16] Collins, *Union Eyes Staff at Penn*, Philadelphia Inquirer, Mar. 1, 1986, at B5.

[17] For a general description of Mr. Morris' career, see Fleeson, *The Toughest, Meanest Union Boss in Town*, Philadelphia Inquirer Magazine, Sept. 4, 1983, at 10.

temptation exists here. Because withdrawal liability usually represents the last opportunity to obtain money from an employer for the benefit of employees, one can only assume that a loyal union advocate would seek the highest amount.

The concern about lack of union trustee impartiality is compounded when the union trustees are involved in the underlying events that lead to the assessment of withdrawal liability. Withdrawal liability is one of the most significant clubs in the union arsenal in contract negotiations, because the liability is triggered if an employer is permanently unable to conclude a new contract. Union leaders who are also union trustees wield that club and may be tempted to do so for partisan reasons unrelated to plan management.

The series of cases involving T.I.M.E.-DC, Inc. ("TIME-DC"), a nationwide trucking company, demonstrate that this concern is not speculative. TIME-DC refused in 1982 to sign the National Master Freight Agreement because it needed economic relief in order to survive non-union competition fostered by the deregulation of the trucking industry. A strike ensued, and the company remains without a contract for many of its drivers. Despite the continued pendency of a labor dispute forestalling withdrawal liability, *see* 29 U.S.C. § 1398(2) (1982), several pension funds made withdrawal liability assessments and the company was forced to obtain injunctions against the claims.[18] The PBGC has acknowl-

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[18] *See T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 597 F. Supp. 256 (D.D.C. 1984), and 616 F. Supp. 400 (D.D.C. 1985); *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984); *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983).

If TIME-DC did permanently cease business, it would have an estimated total withdrawal liability of approximately $30 million

edged that these cases involved "assessments of withdrawal liability that the courts perceived as arbitrary at best and outrageous at worst." [19] Brief of *Amicus Curiae* PBGC at 8, *Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, No. 86-1628 (5th Cir., filed Nov. 14, 1986).[20] In at least one of these cases, the plan trustees who made or permitted these "arbitrary at best and outrageous at worst" assessments were also union leaders involved in the collective bargaining relationship with TIME-DC,[21] and the motivation to pressure or punish TIME-DC with respect to its collective bargaining position is apparent in all the cases.

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owed to 27 multiemployer funds. *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 597 F. Supp. at 264.

[19] One court described the assessment before it as "inconsistent and irrational." *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 616 F. Supp. at 404.

The TIME-DC saga continues. In the past year, TIME-DC has been forced to obtain two additional injunctions, against the Central States Fund and against the Western Conference of Teamsters Fund. *See Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, 639 F. Supp. 1468 (N.D. Tex. 1986); *T.I.M.E.-DC, Inc.* v. *Western Conference of Teamsters Pension Trust Fund, Inc.*, 7 Employee Benefits Cas. (BNA) 2124 (N.D. Cal. Sept. 5, 1986).

[20] The PBGC's acknowledgement there of trustee abuse of the withdrawal liability power contrasts sharply with its effort in this case to picture trustees as mere extensions of congressional will: "[I]t was entirely reasonable for Congress to entrust plan trustees and actuaries with certain legislative, policymaking functions in order to take advantage . . . of the trustees' institutional commitment to foster the statutory goals that led Congress to enact the MPPAA in the first place . . . ." PBGC Brief at 30.

[21] *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. at 297 & n.1. For example, Salvatore Provenzano served on the Board of Trustees of the Local 560 Fund, was President and Chief Executive of Local 560, and served on the Teamsters National Freight Negotiating Committee. *Id.*

Union trustees hold " 'two practically and seriously inconsistent positions.' " *Ward* v. *Village of Monroeville*, 409 U.S. at 60 (quoting *Tumey* v. *Ohio*, 273 U.S. at 534). Such trustees are like the judge in *Offutt* v. *United States*, 348 U.S. 11, 17 (1954), who violated due process by ruling on an attorney's conduct in a contempt proceeding while "personally embroiled" in the underlying controversy. Just as that judge was not deemed "to represent the impersonal authority of law," *id.* at 16, so also union trustees cannot be deemed impersonal adjudicators of the liability of employers with whom they have adversarial relations.

C. The Private Character of the Trustee Position Further Underscores the Lack of Fitness to Act as Statutory Decisionmakers.

Pension fund trustees are private individuals, not government officials. Trustees are appointed and removed without government oversight, examination or regulation beyond the cumbersome vehicle of enforcement litigation. There is thus even less reason than in *Ward* or *Schweiker* v. *McClure*, where government officials were involved, to have confidence that they can act as impartial decisionmakers uninfluenced by personal considerations.

The unseemly history of multiemployer pension funds and their ties to organized crime underscores the dangers inherent in granting private individuals quasi-judicial powers. As Judge Irving Kaufman has found in his role as Chairman of the President's Commission on Organized Crime: "Traditionally, labor racketeering evoked images of relatively simple and direct extortion imposed by threats of strikes or physical force. *Today, however, it is just as likely to appear in the form of benefit fund manipulation* facilitated by the assistance of corrupt professionals such as lawyers, accountants, and bankers." [22]

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[22] Prepared Statement of Judge Irving R. Kaufman, *reprinted in* President's Commission on Organized Crime, *Organized Crime and*

The most documented example of organized crime domination of a pension fund involves the Central States Fund, which was the subject of extensive government investigations. One Commissioner of the President's Commission on Organized Crime stated on the record that for many years "the Central States Pension Fund was known within law enforcement circles and other circles as well, as the private bank of organized crime." [23] The Fund "loaned money to and invested in organized criminal endeavors." [24] The Fund and its trustees allegedly funneled hundreds of millions, perhaps billions of dollars to organized crime,[25] accounting at least in part for the Fund's huge unfunded liability of over $3 billion. Four of the Fund's former trustees have been

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Labor-Management Racketeering in the United States, Record of Hearing VI, at 650 (Apr. 22-24, 1985) (emphasis added) [hereinafter *Organized Crime Commission Record*].

[23] *Id.* at 609 (statement of Commissioner Manuel).

[24] *See Findings and Conclusions*, H.R. Rep. No. 177, 97th Cong., 1st Sess. 181 (1981).

[25] Details of the links between Central States and organized crime have been the subject of frequent government investigations. In the five-year period from 1976 to 1981 no fewer than eight congressional hearings were held concerning Central States' alleged misuse of funds to benefit organized crime. *See* Comptroller General of the United States, *Investigation To Reform Teamsters' Central States Pension Fund Found Inadequate*, app. IX, at 145-46 (GAO/HRD-82-13, Apr. 28, 1982). Those hearings included: *Investigation of Alleged Irregularities in the Operation of the Teamsters' Central States Pension Fund: Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (July 1, 1976); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Mar. 14 & 15, 1977); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Apr. 5 & July 19-20, 1977); *The Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (July 18-19, 1977); *Central States*

convicted, *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 687 n.7 (7th Cir. 1986) (en banc), and the Fund is being operated pursuant to two consent decrees entered in the United States District Court for the Northern District of Illinois.[26]

The problem of corruption and malfeasance in multi-employer funds is not limited to Central States. For example, according to the Annual Report to Congress of the Pension and Welfare Benefits Administration for 1984—the latest available report—the Secretary of Labor filed suit that year against twelve union-sponsored employee benefit funds or their trustees for various acts of mismanagement and misuse of assets. The Secretary that year obtained court judgments, consent decrees, or criminal convictions against another seven funds or their trustees.[27]

The current executive director of Central States, who led the clean-up of the Fund, has cautioned that, because of lack of regulation, organized crime involvement in pension funds can be expected to continue: "[W]hen you find large blocks of money like this generally unregulated with not [sic] on-site examinations, the organized crime elements, the unsavory elements in this country

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Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (Mar. 22, 1978); *Central States Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (July 17-18, 1978); *Central States Teamsters' Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (Mar. 24, 1980); *Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (Aug. 25-26 & Sept. 29-30, 1980).

[26] *Organized Crime Commission Record* at 589-90 (testimony of George Lehr).

[27] *See* Pension and Welfare Benefits Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act, 1984 Report to Congress* at 3-9.

are going to pounce on them and they are going to be there." [28]

II. THE ACT GIVES TRUSTEES FULL POWER TO EFFECTUATE THEIR BIAS.

The foregoing discussion has shown that plan trustees cannot be deemed unbiased for purposes of performing a quasi-judicial decisionmaking role. The PBGC argues that nonetheless the calculation of withdrawal liability is essentially ministerial and that the trustees have no ability to put their bias into effect. An examination of a plan's powers under the Act demonstrates the contrary. The plan trustees have wide latitude to effectuate their bias both in the application of the statute and in determining the assumptions necessary for the calculation of withdrawal liability.

A. The Plan's Ability to Determine Whether to Apply Statutory Exceptions Gives Trustees the Power to Expand or Reduce Withdrawal Liability.

The numerical calculation of withdrawal liability is only a small part of the determination, as actuaries themselves have noted.[29] The presumption of correctness

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[28] *Organized Crime Commission Record* at 599. Mr. Lehr similarly stated on camera in a recent televised news report on benefit fund abuse: "[I]t's not only the least regulated, it's the most abused body of money that exists in this country today. . . . The mobsters, the scumbags, the rip-off artists, what those people do is look for something where there is not good regulation, and they have found this area where there is not good regulation." *ABC World News Tonight* (Dec. 29, 1986). In that same report, a Labor Department spokesman stated on camera: "You have corrupt trustees and administrators, people with hoodlum affiliations managing these funds. . . . The size of the problem simply overwhelms those who are charged with conducting enforcement responsibilities." *Id.*

[29] In a Report by the Academy Task Force to the House Task Force considering the proposed legislation, the American Academy of Actuaries stated: "The manner of allocating the total unfunded

that was declared unconstitutional by the court of appeals applies to "any determination . . . under sections 1381 through 1399 of this title and section 1405." 29 U.S.C. § 1401(a)(3)(A) (1982). Among the factual matters potentially determinable under these sections are:

—whether a withdrawal has occurred, *i.e.*, whether an employer has "permanently cease[d]" having an obligation to contribute or "permanently cease[d] all covered operations." *Id.* § 1383(a).

—whether one of the industry exemptions applies (construction, entertainment, trucking, retail food). *Id.* §§ 1383(a)-(d), 1385(c).

—whether compliance with the sale of assets provision has been met, to protect such a sale from the imposition of withdrawal liability. *Id.* § 1384.

—whether there has been a "contribution decline" or a "partial cessation of the employer's contribution obligation," sufficient to trigger a partial withdrawal. *Id.* § 1385(a).

—whether a change in business form is to be considered a withdrawal. *Id.* § 1398(1).

—whether a sale of assets not complying with § 1384 reduces liability, and what the "liquidation or dissolution value" of the employer is for purposes of calculating the reduction. *Id.* § 1405(a).

—whether the liabilities of the employer exceed its assets, for purposes of applying the liquidation or dissolution provision. *Id.* § 1405(d).

That the presumption applies to factual determinations, rather than legal determinations,[20] only begs the

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vested liability to individual employers is not strictly an actuarial matter except in the details of calculation." *Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare & Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor*, 96th Cong., 2d Sess. 1503 (1979).

[20] The PBGC notes that it has concluded that the presumption does not apply to questions of law. *See* PBGC Brief at 39. The

question. A fund has tremendous discretion in individual cases to determine that an exception or provision does or does not apply, even when it does not have access to information that permits it to make an informed determination. This individualized, case-specific decision

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PBGC fails to note that under its arbitration rules the arbitrator need not distinguish between findings of fact and conclusions of law, 29 C.F.R. § 2641.7(a)(1) (1986), thus permitting confusion and argument as to the extent to which the presumption influences an award.

Section 2641.7(a)(1) was added at the behest of the organization that represents multiemployer plans, which argued that if arbitrators were enjoined to separate fact and law, "[t]he practical result . . . might be to eliminate the effect of the statutory presumption in many cases." *Comment Letter to Office of General Counsel, PBGC, from Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans* at 10 (Sept. 6, 1983) (on file with PBGC).

Thus, while claiming to the Court that the effect of the presumption is limited because "many of the trustees' decisions concerning the applicability of exemptions will be subject to de novo review," JS 21, the PBGC appears to be taking administrative steps to reduce that likelihood.

It should also be noted that pension funds have not universally adopted the PBGC's position that the presumption only applies to factual determinations. In *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, 635 F. Supp. 335 (D.D.C. 1986), the district court found that there were no facts in dispute and that the Fund's assessment was invalid as a matter of law. The Fund on appeal argued, *inter alia*, that the district court erred in not applying the presumption to the Fund's legal determination:

> Presumably because the court viewed the challenge raised by Cooper as raising a pure legal question, it conducted a *de novo* determination of that question. . . . Cooper was not entitled to prevail in the court below unless it overcame the presumption of correctness which the statute accords the Fund's withdrawal liability determination.

Brief of Appellants at 19, *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, No. 86-7015 (D.C. Cir., filed Jan. 22, 1987).

can eliminate withdrawal liability altogether or impose liability without a proper basis.[31]

The potential for abuse is shown in the case law. In *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984), the Fund demanded withdrawal liability despite the company's demonstration that a labor dispute existed. The court found that one trustee misunderstood the relevant law and "at the very most none of the other Trustees was anything more than vaguely familiar with the labor dispute provision of the MPPAA." *Id.* at 625 & n.6.[32] Similarly, in *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, "the Trustees had not heard of the 'labor dispute' exception to the MPPAA before their preparations for testimony." 560 F. Supp. 294, 299 (E.D.N.Y. 1983). Yet, had either assessment gone to arbitration, any factual component of the implicit "determination" that no labor dispute existed would have been presumed correct.

There is no basis in law or policy to shield such decisions from *de novo* review.

B. The Calculation of Withdrawal Liability Is Not a Ministerial Act, but Rather Has Discretionary Elements That Grant a Fund Broad Leeway to Maximize Liability.

The statute permits a fund broad discretion in the assumptions and data employed in the calculation of withdrawal liability, and the calculation is thus far

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[31] The importance of fund power to apply statutory provisions is underscored by the PBGC's efforts to persuade the Court to ignore that power in evaluating the statutory scheme. *See* PBGC Brief at 38-39.

[32] The court also noted that "it appears that some trustees were wholly ignorant of why the Fund asserted withdrawal liability against TIME-DC." *Id.* at 625 n.6.

from ministerial. A fund may use any actuarial assumptions and methods, so long as they "in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). The PBGC cannot require a fund to use any particular assumptions or methods. *Id.* § 1393(a). A fund need not obtain complete data, but rather may "rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b)(2). These provisions permit wide variation among funds in the actuarial determinations.

The General Accounting Office's ("GAO") Report to the Congress, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) [hereinafter *Effects of Liabilities*] confirms the extent of potential actuarial variation and indicates a critical view of the consequent possibility of inequitable liability assessments. The Report notes that assumptions can vary significantly among actuaries, yet "[*n*]*otwithstanding the variables inherent in the determination of a plan's withdrawal liability*, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.* at 24 (emphasis added). The Report concludes:

> Notwithstanding the appropriateness of different actuarial assumptions for different plans, the calculations of a plan's unfunded actuarial liability involves considerable judgment by the actuary concerning future uncertainties. *Because of such uncertainties, the actuary's estimates of future returns on a plan's investments could result in determinations of liabilities that could be inequitable to the withdrawing employers.*[33]

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[33] *Id.* at 33 (emphasis added).

The potential for inequitable determination [34] identified by the GAO is especially severe because the determination is unalterable. Once an employer's withdrawal liability is calculated, there is no provision for changing the liability even if the fund's assumptions later prove in error.[35]

Actuaries themselves confirm the complexity of the withdrawal liability calculation and the potential variation in liability based on the assumptions used. The senior actuarial advisor on the policy and planning staff of the PBGC has noted "unanswered questions," "potential sources of controversy," and "theoretical incongruities" in the calculation of withdrawal liability.[36] Just how indefinite actuarial science can be is shown by the following excerpt from his article:

> Are the assumptions used to establish the charges and credits for the funding standard account appropriate for calculating the [value of vested benefits]? *Maybe.*[37]

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[34] Appellants argue that the fact that the selection of assumptions applies to all withdrawing employers supports the statutory scheme. PBGC Brief at 26-28; Plan Brief at 24-26. If the choice of assumptions leads to inequity to all withdrawing employers, it is hard to see how that is somehow better than inequity only to a particular employer.

[35] Feuer, *The Selection and Arbitration of Withdrawal Liability Interest Rates*, Employee Benefits J., Mar. 1985, at 23, 26 ("An employer's withdrawal liability is calculated once and not adjusted if subsequent events demonstrate that the underlying actuarial assumptions and methods were incorrect.").

[36] Amoroso, *Withdrawal Liability*, Employee Benefits J., June 1982, at 2, 4, 26.

[37] *Id.* at 4 (emphasis added). Funding assumptions are those assumptions used by the plan to estimate long-term contribution needs. *See* 29 U.S.C. § 1082 (1982) (ERISA minimum funding standards). The question of whether to use funding assumptions for purposes of determining withdrawal liability is one of the most critical in terms of the impact on the final amount, and, as

What is "maybe" appropriate to this actuary will nonetheless be "presumed correct" if enshrined in a plan's withdrawal liability assessment.

The PBGC's actuarial advisor concludes:

> Determining an employer's withdrawal liability is a complicated business, which is not exclusively in the technician's domain. Indeed, one of the purposes, here, was to underscore that point of view. "Theoretical" tradeoffs may be necessary to achieve equitable results envisioned by Subtitle E of Title IV; focusing exclusively on any one factor may not be appropriate.[28]

Thus, far from being a purely ministerial task, the actuary's determination involves sensitive and complicated questions of trade-offs, "not exclusively in the technician's domain." *See also* Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World, Oct. 1982, at 41, 44 ("The actuary's role under MEPPAA is a difficult and precarious one.").

Because the actuary is retained by the plan, any discretionary trade-offs will usually be resolved in the plan's favor. If not, the plan is free to change actuaries or to employ its own actuarial assumptions.

The GAO Report *Effects of Liabilities* again demonstrates the extent of a plan's power. Perhaps the most important actuarial assumption is the interest rate assumed for calculating the future return on plan invest-

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noted by the PBGC's actuarial adviser, one of the areas most open to actuarial judgment. The PBGC noted to the GAO that "[b]ecause the assumptions used for plan funding calculations tend to err on the side of conservatism, these calculations may overstate unfunded vested liabilities." *Effects of Liabilities* at 72. To the Court, however, the PBGC claims that use of funding assumptions by two-thirds of pension funds is not evidence of bias. PBGC Brief at 28 n.20.

[28] *Id.* at 6.

ments. Actuaries have advocated five different types of interest rates,[39] and a plan's unfunded vested benefits can vary dramatically according to which is used. The GAO Report found a one percent change in the interest rate could change the value of vested benefits by eight to ten percent. The Report provided an example of one fund whose unfunded vested benefits went from $7,000,000 to $0 based on the interest rate used. *Id.* at 24, 29. The Report further noted: *"The [interest] rate may depend on the philosophy of the actuary or actuarial firm employed by the plan or on a decision of the plan's trustees."* *Id.* at 24 (emphasis added).

The PBGC has confirmed that plan trustees have the final say over the actuarial assumptions used in the withdrawal liability calculation. In the preamble to its proposed arbitration rules, the PBGC stated: "[T]he joint board of trustees as plan sponsor of a multiemployer plan shall approve the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses." 48 Fed. Reg. 31,251, 31,252 (1983).

A memorandum produced in a different case demonstrates the interdependent relationship of a pension fund and its actuary and explodes the fiction propounded by appellants that the actuary "is a neutral decisionmaker." Plan Brief at 25; *accord* PBGC Brief at 36. An actuary with Martin E. Segal & Co., a major firm that is the consulting actuary for approximately one-quarter of all multiemployer plans,[40] wrote one of its clients, the Board of Trustees of the Marine Mates and Pilots ("M.M. &

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[39] Harrold, *Withdrawal Liability—Which Interest Rate to Use*, Int'l Found. of Employee Benefits Digest, June 1985, at 6, 6. The author identifies the rates as market rates, insurance company annuity purchase rates, PBGC rates, blended rates, and funding rates. The author further notes: "Combinations of these, of course, are possible." *Id.*

[40] *Effects of Liabilities* at 72.

P.") Pension Fund, concerning withdrawal liability. The actuary "urge[d] that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month." [41]

The actuary's suggested agenda of the matters to be "presented to the Trustees for decision" was as follows:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal."
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.[42]

There is certainly nothing improper about an actuary working with his client and seeking approval on major decisions regarding the withdrawal liability calculation. Indeed, it is entirely expectable. Nothing in the statute or in the economic relationship between a fund and the actuary makes the actuary anything other than what he normally is: the agent of his client.[43] Such an agent

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[41] Memorandum from Philip B. Polak to Board of Trustees, M.M. & P. Pension Fund (Apr. 8, 1981) (reproduced herein as Appendix B) (produced by Pension Fund in discovery in *In re Arbitration between Marine Transport Lines, Inc. & M.M. & P. Pension Fund*, No. 13621001085 (MEPP)).

[42] *Id.*

[43] The PBGC notes that an actuary may be suspended if he fails to discharge his duties under ERISA. 29 U.S.C. § 1242(b)(1) (1982); *see* PBGC Brief at 36 n.27. The evaluations of the PBGC's actuary and the GAO's *Effect of Liabilities* discussed before demon-

cannot, consistent with due process, be deemed a "neutral decisionmaker" of the fund's liability assessment.

Funds are free to shop for the actuaries whose "philosophy" best fits their own [44] and to make decisions on the major elements of the liability calculation. But the employer is not permitted effectively to challenge either selection.

C. The Fund's Decision Is Adjudicative in Nature, Not "Legislative Policymaking."

Withdrawal liability in its simplest terms is a statutorily created debt,[45] a congressional mandate authoriz-

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strate that there is sufficient discretion under the statute to vary withdrawal liability significantly without running afoul of that provision. Indeed, given the trustees' duty to "be biased in favor of pension plans," Plan Brief at 30, an actuary arguably would run afoul of the statute if he did not make discretionary trade-offs in the plan's favor.

[44] The extent of the variation that can occur in actuarial assessment and the potential for "actuary-shopping" is illustrated by the different results the Central States Fund obtained from three actuarial firms during the period 1975-1977. The range of the dispute is perhaps best communicated by the GAO headings in its Report on this subject:

"First actuary indicated the Fund is financially sound."

"Second actuary states Fund is financially unsound."

"First actuary disagrees and states that IRS agrees the Fund is financially sound."

"Third actuary agrees with second that the Fund is not financially sound."

Comptroller General of the United States, *Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate* 109-11 (GAO/HRD-82-13, Apr. 28, 1982).

[45] *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring); Statement of Sen. Williams, quoted at p. 11 *supra*.

ing the transfer of large sums of money [46] from employers to pension funds. Through their powers to resolve initially statutory exemptions and to establish actuarial methods and assumptions, pension funds determine both the existence and the amount of that debt. There is no merit to the contention that this determination involves unreviewable "policy" decisions that are "legislative" rather than "adjudicative" in nature. *See* PBGC Brief at 19, 30.

The PBGC makes a far-fetched analogy to governmental decisions that involve weighing and balancing of competing public policy interests entrusted to administrative agencies. The cases relied on are inapposite here. In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), the case involved the Department of Transportation's decision as to where to build a highway. In *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482, 495 (1976), the decision concerned a School Board's treatment of teachers who were admittedly on strike illegally, a matter which "was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well." Moreover, the Court noted that the Board members—unlike the trustees here—"did not . . . ha[ve] the kind of personal or financial stake in the decision that might create a conflict of interest." *Id.* at 492. *Heckler* v. *Chaney*, 105 S. Ct. 1649 (1985), involved the decision

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[46] The statutory *minimum* for withdrawal liability is $50,000, 29 U.S.C. § 1389 (1982), far in excess of the minimum amount for federal court jurisdiction. Withdrawal liability assessments running into the millions of dollars are not uncommon. *See* note 18 *supra*; *Robbins* v. *The Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986) (over $30 million in withdrawal liability claims), *appeal pending*, Nos. 86-1963, 86-1964, 86-2241 (7th Cir.); *The Flying Tiger Line, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 86-304 (D. Del. Oct. 17, 1986) (over $36 million withdrawal liability claims), *appeal pending*, Nos. 86-5817, 86-5931, 87-3083 (3d Cir.).

by the Food and Drug Administration not to undertake enforcement actions.[47]

These are decisions by duly appointed governmental entities in broad policymaking areas. By contrast, withdrawal liability is the determination by private trustees —elected only by other trustees—of the amount of money employers will pay to the institution the trustees manage. This concrete resolution and assessment of liability is clearly an adjudicative matter.

The PBGC's argument proves too much. The logical outcome of the argument is that there should be no review at all of fund liability determinations. However, there is very definitely "law to apply" to fund determinations. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 413. Far from being unreviewable "legislative, policymaking functions," [48] fund determinations are resolutions of monetary liability that should be tested through the impartial adversarial system guaranteed by due process.

III. UNDER THE STATUTORY SCHEME THE EMPLOYER AT NO POINT RECEIVES *DE NOVO* ADJUDICATION OF HIS WITHDRAWAL LIABILITY ASSESSMENT.

Due process requires that at some point a citizen has the right to a trial *de novo* before a neutral and detached decisionmaker. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60-61 (1972); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43, 245 (1980). *Ward* held that due process requires a neutral and detached judge in the first instance, and even *de novo* review does not protect the failure to do so.

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[47] *Friedman* v. *Rogers*, 440 U.S. 1 (1979), involved no administrative decision at all, but rather involved an attack on a state legislature's policy decision regarding permissible trade practices in the guise of attacking the State Optometry Board's composition. *See id.* at 7, 17-18.

[48] PBGC Brief at 30.

409 U.S. at 61-62. *Marshall* v. *Jerrico* held that where the initial determination of liability was placed with a party with enforcement rather than judicial responsibilities trial *de novo* "of all *factual* and legal issues" preserved the statutory scheme. 446 U.S. at 245 (emphasis added); *see also Withrow* v. *Larkin*, 421 U.S. 35, 58 (1975) ("substantial due process question would be raised" if "nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision").

The pension fund trustees cannot be deemed impartial, and they have the duty and the power to maximize their assessments both in general and in individual cases. The MPPAA's shielding of this ex parte determination by an interested decisionmaker from *de novo* review through the presumption of correctness completes the deprivation of due process. At no point does an employer receive the trial *de novo* before an impartial decisionmaker guaranteed by the Constitution.

A. The Presumption of Correctness Unfairly Obstructs Impartial *De Novo* Review.

The influence of the presumption can be seen in arbitrations where the presumption is applied in talismanic fashion to resolve disputed questions of fact. *See, e.g.*, *Coal Drilling Services, Inc. & UMW 1974 Pension Plan*, 5 Employee Benefits Cas. (BNA) 1833, 1835 (1984); *UMW 1974 Pension Plan & Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1604 (1985); *Hertz Corp. & Commission Drivers Local 187 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1367, 1380-81 (1983); *Palmer Coking Coal Co. & UMW 1950 & 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369, 2383 & n.6 (1984). In *Hertz*, the arbitrator resolved the disputed issue on the basis of the presumption even though the company's position had "a certain undeniable plausibility." 4 Employee Benefits Cas. (BNA) at 1381.

The arbitrator in *Palmer Coking* described the presumption as imposing "rigorous standards of arbitral review." [49]

That arbitrators have in some instances revised plan determinations does not prove that the system is fair, only that the unfairness does not guarantee a result adverse to the employer in every case. Presumably the Mayor of Monroeville did not impose a fine in every case that came before him. The appellees do not have the burden of showing "special prejudice in [the] particular case." Such a burden would "require[] too much and protect[] too little." *Ward* v. *Village of Monroeville*, 409 U.S. at 61. Appellees need only show a systemic deprivation of a fair, *de novo* hearing. *Cf. In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

The unconstitutional effect of the presumption is underscored by its uniqueness. Unlike other presumptions commonly written into statutes, this is not a "presumption" at all in the evidentiary sense of linking "Fact A" to "Fact B." [50] Congress here has not legislatively de-

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[49] 5 Employee Benefits Cas. (BNA) at 2383 n.6. Compounding the effect of the arbitral presumption is the review required of the courts. In a judicial review proceeding, the arbitrator's findings of fact are rebuttable only by a "*clear* preponderance of the evidence." 29 U.S.C. § 1401(c) (1982) (emphasis added). Theoretically, an employer could prove his case by a preponderance and still lose.

[50] *See Mobile, Jackson & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910) (presumption in civil statute constitutional so long as there is a "rational connection between the fact proved and the ultimate fact presumed"); *see, e.g., Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (coal mining presumed to cause black lung disease); *Mathews* v. *Lucas*, 427 U.S. 495 (1976) (illegitimate child entitled to presumption of dependency on decedent parent where parent evidenced relationship prior to death); *Atlantic Coast Line R.R.* v. *Ford*, 287 U.S. 502 (1933) (failure of railroad to

termined a particular fact, but attempted to favor a particular class of private parties in the adversarial process.[51] Congress intentionally was attempting to limit an employer's ability to defend himself against a fund's assessment. Congress intended that "[w]ithdrawal liability . . . be collectible upon notice and demand to the withdrawn employer by the plan sponsor," H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2993, 3018, which was consistent with the congressional purpose that pension funds "maximiz[e] the total ultimate recovery," statement of Sen. Williams, quoted at p. 11 *supra*.

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give crossing signals presumed to be proximate cause of crossing collision).

[51] The appellant Plan acknowledges this congressional favoritism but attempts to defend it by arguing that there is an analogy between trustees' determinations with respect to claims for benefits by participants—which are evaluated under the deferential "arbitrary and capricious" standard—and their determinations under the MPPAA. Plan Brief at 27-29. Because the trustees' fiduciary duty runs to beneficiaries, *see NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981), there is a legal basis for assuming that trustees will make decisions favorable to the beneficiaries absent evidence to the contrary. With withdrawal liability, trustees inherently have an adversarial relationship and such deference is therefore inappropriate.

Moreover, as the various cases cited by the Plan recognize, trustee determinations with respect to benefit claims are reviewed under the deferential arbitrary and capricious standard because they depend on the trustees' "readings of the plans they administer." *Richland Industries, Ltd.* v. *Robbins*, 617 F. Supp. 639, 646 (N.D. Ill. 1985). By contrast, withdrawal liability requires the application of a supervening statute to fact situations where the trustees may have no expertise or may have no information whatsoever. There is thus no basis for deference. *Cf. id* at 646 (principle that courts should defer to the trustees' administration and interpretation of plan rules regarding benefits "does not extend to the interpretation of statutes, a task for which trustees are scarcely suited as experts generally").

Congress instituted the presumption in the belief that it was necessary "to ensure the enforcability [sic] of employer liability," on the rationale that employers "could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element in making an actuarial determination." [52] The rationale is neither supported in the legislative history nor supportable. First, that rationale provides no basis for applying the presumption to statutory determinations, determinations that can have a greater effect on the ultimate liability of individual employers than the actuarial calculation. *See* pp. 21-24 *supra*. Second, because the employer bears his own expenses and is subject to sanctions for raising unreasonable or frivolous claims, *see* 29 C.F.R. § 2641.9 (1986), there is no greater likelihood of employer delay "nullifying" the underlying obligation than in any other kind of litigation.

More important, the very fact that there can be a range of actuarial judgments supports the conclusion that an employer should have the opportunity to present his positions to a genuinely neutral and disinterested decisionmaker uninfluenced by a congressional mandate to favor one party over another.[53] Large amounts of money

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[52] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2954; *see also* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations* 20-21 (Comm. Print 1980).

[53] This is the critical point of departure for the First Circuit's *en banc* decision in *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985). The court there acknowledged that "the trustees came to their task of calculating withdrawal liability with a bias," *id.* at 1140, but believed that Congress constitutionally could permit a biased determination among the range of alternatives. *See id.* at 1143-44. The court's argument confuses the due process guarantee of an impartial decisionmaker with the underlying merits question. Appellees are entitled to an impartial review of that con-

are at stake,[54] which often represent all that an employer has.

The claimed need for "efficiency" cannot outweigh the right to an impartial adjudication. There is no support in the case law for appellants' implicit assertion to the contrary. Due process is always in some sense "inefficient," but due process cannot be denied merely because the opposing party would like an easier road than a fair hearing leading to an impartial adjudication.

B. The MPPAA Procedural Scheme Violates the Perception of Justice.

The MPPAA procedural scheme, in conjunction with the underlying substantive imposition of the liability, violates the fundamental precept that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *see also Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 (1980) (Brennan, J., concurring) ("For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably."). The principle of neutrality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall* v. *Jerrico*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).[55] The MPPAA does not generate that feeling.

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cededly biased determination. Significantly, neither of the appellants attempts to justify the MPPAA presumption with the argument advanced by the *Keith Fulton* court.

[54] *See* note 46 *supra*.

[55] Studies have shown that the perception of procedural fairness is critically related to the presence of a "demonstrably independent decisionmaker." J. Marshaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings and Appeals*, at XXIV (1978); *see also* Verkuil, *A Study of Informal Adjudica-*

The employer faces a liability that can exceed his net worth. That liability is imposed by statute despite the employer's agreement in arms-length bargaining to make specified and limited contributions, and the liability can far exceed the contributions the employer agreed to make.[56] The employer did not create the plan underfunding that forms the basis of the liability, nor did he have any ability to control the decisions that led to the underfunding. *See* p. 2 *supra*. The assessed liability does not necessarily go to fund the benefits of his own employees. The employer must begin paying the liability before he even receives a resolution of the amount. 29 U.S.C. § 1399(c)(2) (1982).

The determination of this noncontractual liability is made by the trustees who *were* responsible for plan underfunding[57] and who will receive the money. Half of the trustees are former competitors with a pecuniary interest in maximizing liability to reduce their own contributions, and half are union trustees with an interest in maximizing the money available for benefits to union members. Their determination is then treated with a "presumption of correctness" for the express purpose of "dampening"[58] the employer's effort to obtain an unbiased review through the normal adversarial process.

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tion Procedures, 43 U. Chi. L. Rev. 739, 751 (1976). As the court of appeals succinctly noted, " 'even a dog distinguishes between being stumbled over and being kicked.' " JS 20a (quoting O. Holmes, *The Common Law* 3 (1881)).

[56] Here, appellees' assessed liability is almost double the contributions made in the prior five years. *See* note 8 *supra* and accompanying text.

[57] The essence of plan underfunding is the failure to match promised benefits to expected contributions, which is the responsibility of the trustees. *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1030 (1986) (O'Connor, J., concurring).

[58] *See* PBGC Brief at 44-45.

In the vivid image of Judge Aldrich, the employer

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight. Although not put in exactly those terms, the justification offered for this is that it was his own fault for associating with people like that, and his opponent needs the money.[59]

Due process is really nothing more than ensuring that there is indeed a "fair fight." While many problems and controversies remain with the MPPAA, removing the presumption of correctness at least gives the employer an even opportunity to contest fund determinations, returning some sense of justice in accordance with "the deep-rooted demands of fair play enshrined in the Constitution." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring).

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[59] *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1146 (1st Cir. 1985) (en banc) (Aldrich, J., dissenting).

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Dated: March 9, 1987

APPENDICES

APPENDIX A

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

I. PLAN ASSETS

(A) Statement of assets as of December 31, 1980

	Book value	Market value
Cash	$ 393,063	$ 393,063
Due from investment custodian	183,850	183,850
Accrued interest on marketable securities	9,584	9,584
Government bonds	1,727,166	1,383,906
Corporate bonds	1,868,840	1,310,000
Common stock	5,270,045	5,317,530
Preferred stock	107,490	115,875
Pooled funds	273,397	273,397
Buildings and other depreciable property	23,166	23,166
Less liabilities	3,042	3,042
Total assets	$9,853,559	$9,007,329

(B) Statement of income and disbursements as of December 31, 1980

Income	
Employer contributions	$1,582,806
Withdrawal liability payments	0
Investment income	585,536
Realized gain (loss)	166,584
Unrealized appreciation	339,122
Total	$2,674,048
Disbursements	
Benefit payments	$1,033,915
Expenses	180,245
Total	$1,214,160
Net increase in assets	$1,459,888
Market value of assets as of	
January 1	$7,547,441
December 31	$9,007,329

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

II. UNFUNDED VESTED BENEFITS LIABILITY
AS OF DECEMBER 31, 1980

(A)	Vested benefits liability	
	(1) Retired participants and beneficiaries receiving payments (498)	$10,263,832
	(2) Other participants (705)	9,533,685
	(3) Total (1,203)	$19,797,517
(B)	Plan assets	$ 9,007,329
(C)	Unfunded vested benefits liability (UVB)	$10,790,188

Notes

(1) All calculations are based on the benefit level in effect on December 31, 1980.

(2) The present values shown were calculated in accordance with Interpretations 1 and 2 of the American Academy of Actuaries. The assumed investment rate of return was 6%.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

III. DEVELOPMENT OF UNAMORTIZED UNFUNDED VESTED BENEFITS LIABILITY AS OF DECEMBER 31, 1980

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
A. *Original Liability Components at 12/31/80*			
1. Unfunded vested benefits liability (UVB) at 12/31/79	$11,697,749	$ 0	$11,697,749
2. Allocations to withdrawn employers through 12/31/80	(1,582,354)	1,582,354	0
3. Changes in UVB through 12/31/80	(401,791)	0	(401,791)
4. Reallocated amounts through 12/31/80	164,821	(164,821)	0
5. Total	$ 9,878,425	$1,417,533	$11,295,958

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
B. *Unamortized Unfunded Vested Benefits Liability (UVB) at 12/31/80*			
1. Prior year UVB remaining unamortized at 12/31/80			
a) Unamortized at 12/31/79	$11,697,749	$ 0	$11,697,749
b) Allocations to employers who withdrew in 1980	(1582,354)	1,582,354	0
c) Amortization during 1980	(505,770)	0	(505,770)
d) Remaining unamortized at 12/31/80	$ 9,609,625	$1,582,354	$11,191,979
2. UVB added at 12/31/80			
a) Change in UVB during 1980	$ (401,791)	$ 0	$ (401,791)
b) Amounts reallocated at 12/31/80	164,821	(164,821)	0
c) Total	$ (236,970)	$ (164,821)	$ (401,791)
3. Unamortized UVB at 12/31/80 = 1 + 2	$ 9,372,655	$1,417,533	$10,790,188

Note

Amounts reallocated at 12/31/80 consist of $9,007 excluded under de minimus rule and $155,814 declared uncollectible from employers withdrawn in 1980.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

IV. EMPLOYER CONTRIBUTION HISTORY

	Employers Still Participating at:	
	12/31/79	12/31/80
1975 Plan Year	$ 789,799.20	N/A
1976 Plan Year	970,576.05	$ 832,560.05
1977 Plan Year	1,120,531.59	968,837.59
1978 Plan Year	1,244,240.01	1,095,454.01
1979 Plan Year	1,460,324.00	1,298,378.00
1980 Plan Year	N/A	1,431,082.00
5 Year Total	$5,585,470.85	$5,626,311.65

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

V. FACT SHEET FOR DETERMINING POTENTIAL WITHDRAWAL LIABILITIES FOR EMPLOYERS WITHDRAWING IN 1981

Components of Total Plan Liability
(before amortization)

Date Added (Source)		Amount	Total Plan Contributions	
			Plan Years	Amount
12/31/79		$11,697,749	1/1/75 to 12/31/79	$5,585,470.85
12/31/80:	Change in UVB	$ (401,791)	1/1/76 to 12/31/80	$5,626,311.65
	Reallocation	164,821		
		$ (236,970)		

Notes

1) Contributions shown are the total for all employers who had not withdrawn from the plan as of the date the liability component was added.

2) Each component of liability is allocated to participating employers based on the ratio of their contributions during the applicable time period.

3) Once allocated, each liability component is assumed to amortize at the rate of 5% each year from the date the component was added.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

VI. COMPUTATION METHODS APPLICABLE UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

In accordance with the decisions made by the Trustees of the Local 115 Pension Plan, the following methods are used in calculating withdrawal liabilities under MEPPA:

(A) Withdrawal Liability Allocation Method

The amount of unfunded vested benefits allocable to a withdrawing employer is determined in accordance with Section 4211(b) of ERISA. This section is referred to as the "Presumptive Method."

(B) De Minimus Rule

The mandatory De Minimus Rule is applicable, as described in Section 4209 of ERISA. The maximum de minimus amount under this section is equal to the lesser of ¾ of 1 percent of the plan's unfunded vested benefits liability and $50,000.

(C) Employer Contribution History

Each withdrawing employer's share of the unfunded vested benefits liability will be determined based on 5 years of contribution history.

(D) Calculation of Withdrawal Payments

(1) The annual payment is calculated based on the withdrawing employer's highest contribution rate and average base units during the 10

plan years preceding withdrawal. For purposes of withdrawals during 1980, only the six plan years starting in 1974 are used. For withdrawals during 1981, seven plan years will be used.

(2) The annual amount due from a withdrawing employer is to be payable on a monthly basis.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

VII. ACTUARIAL METHODS AND ASSUMPTIONS

(A) Asset valuation method

For the purpose of determining the unfunded vested benefits liability, assets are valued at market value.

(B) Persons included

Based on data provided to us, all persons entitled to coverage under the plan as of the valuation date are included in the calculations.

(C) Significant actuarial assumptions

(1) Investment return

6% compounded annually, net of investment expenses.

(2) Retirement age

Age 65, age after completion of 10 years of service, or age on the valuation date, whichever is greater.

(3) Mortality

(a) Healthy lives—The 1971 Group Annuity Mortality Table, projected to 1975.

(b) Disabled lives—The 1956 Railroad Retirement Board Disability Annuitants Mortality Table.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

WITHDRAWAL LIABILITY FOR YAHN & MC DONNELL, INC.

Date contribution obligation ceased: November, 1981

A. WITHDRAWAL LIABILITY

Employer's Contributions			Employer's Allocated Liability		
Period	Amount	% of Total	For Plan Years	Original Amount	Unamortized Amount
1975-1979	$235,613.50	4.218%	Through 12/31/79	$493,412	$468,741
1976-1980	260,253.00	4.626%	1/1/80-12/31/80	(10,962)	(10,962)
					$457,779

Total liability = $457,779

B. PAYMENT SCHEDULE

(1) Plan Year Ending	(2) Contribution Rate(s) in Year	(3) Date of Rate Change	(4) Average Rate in Year	(5) Total Contribution	(6) Base Units (Weeks) = (5) ÷ (4)
12/31/74	$12.00/$15.00	4/1/74	$14.250	$35,639.40	2,501*
12/31/75	$15.00/$17.50	4/1/75	16.875	38,367.50	2,274*
12/31/76	$17.50/$20.00	4/1/76	19.375	39,755.00	2,052*
12/31/77	$20.00/$23.00	7/1/77	21.500	42,826.00	1,992

12/31/78	$23.00/$26.00	7/1/78	24.500	47,907.00	1,955
12/31/79	$26.00/$29.00	7/1/79	27.500	66,758.00	2,428
12/31/80	$35.00	1/1/80	35.000	63,007.00	1,800
12/31/81	$39.00	1/1/81	N/A	N/A	N/A

* These 3 years produce highest average base units of 2,276.

Annual payment = $39.00 x 2,276 = $88,764
Monthly payment = $88,764 ÷ 12 = $7,397

Payment duration = 71 months at $7,397 plus a final payment of $851.

Peat, Marwick, Mitchell & Co.
February 25, 1982

APPENDIX B

MEMORANDUM

MARTIN E. SEGAL COMPANY

730 Fifth Avenue • New York, N.Y. 10019
(212) 586-5600

Date April 8, 1981

From Philip B. Polak

To Board of Trustees
M.M. & P. Pension Fund

Re M.M. & P. Pension Fund—
Unfunded Vested Liability

In accordance with your decision at your March Trustees' meeting to use our actuarial assumptions, we have calculated the Unfunded Liability for Vested Benefits *only* for the purpose of calculating Employer withdrawal liability under ERISA.

This figure as of December 31, 1979 is: $74,365,700.

When all the data for 1980 is available, we will calculate the change—if any—attributable to the 1980 plan year.

The above figure should not be confused with the unfunded past service liability of your plan which is used to determine the scheduled actuarial cost ($183,696,200).

At this point, we urge that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month.

The agenda for this advisor's meeting could include the following:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal".
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.

If any of the Trustees feel that such a meeting is not desirable at this time—or that other parties should be included—please let me or Counsel know as soon as possible.

Best regards.

/bn
cc: Co-Counsel
Fund Administrator

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, et al.,
Appellants

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR APPELLANT PENSION PLAN

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I. APPELLEES HAVE INCORRECTLY ASSUMED THAT THE TRUSTEES WILL NOT HONOR THEIR FIDUCIARY DUTY

Appellees assume that both employer and employee (or union) trustees necessarily have an interest in maximizing withdrawal liability out of loyalty to the respective parties that appointed them. Appellees state that employer trustees will maximize withdrawal liability "[b]ecause any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw. . . ." Appellees' Brief at 13.[1] Employee or union trustees will maximize the liability to obtain "the maximum amount of money for the benefit of their members. . ." and to punish the withdrawing employer. Appellees' Brief at 14. In *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334, this Court stated that:

> The language and legislative history of §302(c)(5) [29 U.S.C. §186(c)(5)] and ERISA [29 U.S.C. §§1001 *et seq.*] therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.

Accordingly, it cannot be presumed that a trustee will necessarily act in breach of his fiduciary duty, but it must be assumed that a trustee will act in accordance with that duty.

II. APPELLEES HAVE RELIED ON A NUMBER OF HIGHLY QUESTIONABLE SOURCES

In support of their thesis, appellees have cited a number of highly questionable sources. These include newspaper articles (footnotes 16 and 17 at page 15), a

1. In some situations it could be argued that the interest of a non-withdrawing company would be better served by *decreasing* withdrawal liability to entice the withdrawal and remove a competitor.

televised news report (footnote 28 at page 21), an argument advanced in the brief of a party in another case (footnote 30 at page 23), and a memorandum of another actuary to another pension fund taken entirely out of context (page 28 and Appendix B at pages 12a-13a). The Pension Plan submits that it is not proper to ask this Court to strike down an Act of Congress on the basis of such questionable authorities.

III. APPELLEES HAVE ENGAGED IN IMPROPER "SMEAR" TACTICS

Appellees make repeated derogatory references to other entities which are not involved in this case and with which the appellant Pension Plan is in no way connected. See, *e.g.*, page 19 and footnote 25; footnote 21 on page 17. Appellees imply that the appellant Pension Plan is somehow tainted by these derogatory references.

The personal attack on Union Trustee John P. Morris at pages 14-15 of appellees' brief is particularly deplorable. Appellees state that there is no basis for presuming that Mr. Morris can function in an even-handed manner. Appellees cite, *inter alia*, a magazine article entitled, "The Toughest, Meanest Union Boss in Town," the cover story of the Philadelphia Inquirer Magazine, September 4, 1983. Actually the article is not uncomplimentary to Mr. Morris. The subtitle on the cover states that "to working men and women, he's a champion who can't be bought and won't sell out." The article states on page 10 that "John Morris is regarded by the FBI's Philadelphia labor squad as 'Mr. Clean' " and on page 13 that his ascent to power was accomplished "with his 'Mr. Clean' reputation intact." The Pension Plan submits that appellees' own citation demonstrates that the integrity of John P. Morris is beyond reproach — if that has been put in question by appellees' derogatory references to other entities. As to the ability of John P. Morris to fulfill his fiduciary obligations, Mr. Morris is quoted on page 13 of

the article as stating that he knows the difference between "right and wrong" and has "always considered what the right thing to do is." He certainly does not sound like a person who will lightly breach his fiduciary duties.

This case has been presented by appellees to two lower courts with dignity and decorum. It is unfortunate that the same cannot be said of the manner in which appellees have thus far presented their case to this Court.

IV. APPELLEES ARE NOT PRECLUDED FROM SHOWING ACTUAL BIAS

The Pension Plan does not argue that a company can never show that an assessment of withdrawal liability has been tainted by bias. Evidence of bias may, of course, be presented to the arbitrator and the reviewing court. Justice O'Connor noted in the conclusion of the concurring opinion in *Connolly v. PBGC*, 106 S.Ct. 1018 (1986):

> Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. 106 S.Ct. at 1032.

Likewise, the instant case involves only a facial challenge. The Court should properly refuse to speculate about the effect of possible bias in other situations, since there is not one iota of evidence on the record of this case that the assessment of withdrawal liability against the appellees was, in any way, motivated by, or affected by, personal bias or animosity.

V. CONCLUSION

For all the reasons set forth above and in the prior briefs of the Pension Plan and of the PBGC, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

Nos. 86-231, 86-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

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On Appeal from the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership consisting of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on business issues before all branches of the federal government. In this capacity, the Chamber has participated as *amicus curiae* in a wide spectrum of legal challenges to laws which impose unconstitutional or onerous restrictions on businesses.[2]

The withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act at issue in this case impose restrictions on businesses which are both unconstitutional and onerous. Under the Act, any employer that withdraws from a multiemployer pension plan must pay to the plan a proportional share of its unfunded vested benefits. This withdrawal liability is computed and collected by the plan trustees, a group of officials who are responsible for managing the plan. The Act also makes these trustees the statutory guardians of plan assets, and charges them with a strict fiduciary duty to act for the exclusive purpose of providing benefits to plan participants. Section 104(2) of the Act, the provision at issue before the Court, further provides that

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[1] This brief is being filed with the consent of the parties, pursuant to Supreme Court Rule 36.2. The consent letters have been filed with the Clerk of the Court.

[2] *See, e.g., California Federal Savings & Loan Ass'n* v. *Guerra*, 107 S. Ct. 683 (1987); *Fort Halifax Packing Co.* v. *Coyne*, 510 A.2d 1054 (Me. 1986), *prob. juris. noted*, 107 S. Ct. 430 (U.S. Nov. 10, 1986) (No. 86-341); *Wisconsin Dept. of Labor & Industry* v. *Gould*, 106 S. Ct. 1057 (1986); *TWA* v. *Thurston*, 469 U.S. 111 (1985); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Chamber of Commerce of the U.S.* v. *State of New Jersey*, 89 N.J. 131, 445 A.2d 353 (1982).

trustees' assessments of withdrawal liability are *presumed correct* in any subsequent arbitral challenge.[3]

This Court has recognized that the fifth amendment principle that no person shall be deprived of property without due process of law includes a guarantee that the presiding tribunal will be impartial. While pension plan trustees act as a tribunal for withdrawing employers, they hardly constitute an impartial tribunal. Trustees have an "innate taint of partiality"[4] against withdrawing employers resulting from their statutory combination of asset-guarding and penalty-assessing responsibilities. Beyond subjecting withdrawing employers to the assessment of this biased tribunal, the MPPAA imposes on the employer the burden of overcoming a statutory presumption that the assessment is correct. The Chamber submits that adding this layer of armor to an already weighted assessment deprives the employer of the due process mandated by the fifth amendment.

The Chamber was—and is—a supporter of the MPPAA's goals. It is in the interest of companies remaining in multiemployer plans and their employees that withdrawing companies pay their proportional share of the plan's unfunded vested benefits. However, the statutory presumption of correctness denies withdrawing employers any meaningful opportunity to obtain a fair calculation of this liability. *De novo* review by an impartial decision maker—the arbitrator—will guarantee withdrawing em-

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[3] Section 104(2), 29 U.S.C. §1401(a)(3)(A), provides that "any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."

[4] *See Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142 (1st Cir. 1985) (en banc), *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. 1222, 1237-38 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985).

ployers such a fair calculation. Given the large sums of withdrawal liability often assessed, this safeguard will mean the difference between staying in business and bankruptcy for some withdrawing employers. It also may quell the fears of companies currently reluctant to join multiemployer plans because of the perceived danger of immense and unchallengeable withdrawal liability assessments.

Because the Chamber is uniquely situated to present to the Court the broad business perspective on this important issue, it submits this brief, and urges the Court to affirm the decision of the Third Circuit below.

ARGUMENT

I. PRESUMING THE ASSESSMENTS OF A BIASED TRIBUNAL TO BE CORRECT VIOLATES THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS.

The fifth amendment precept that no person shall be deprived of property without due process of law includes the guarantee of an "impartial and disinterested tribunal," in furtherance of the "powerful . . . constitutional interest in fair adjudicative procedure."[5] The assessment scheme of the Multiemployer Pension Plan Amendments Act ("MPPAA") denies this right to employers who withdraw from multiemployer plans. Empowering trustees, inherently biased decision makers, with great latitude in computing withdrawal liability, and then imposing the burden on employers to prove the assessment unreasonable, deprives employers of any meaningful opportunity to obtain a fair calculation of their liability. As described by Judge Bailey Aldrich, an employer withdrawing from a multiemployer pension plan:

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be

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[5] *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980).

> exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight.[6]

The Chamber recognizes that trustees are best equipped to make an initial determination of withdrawal liability, given their knowledge of the plan's history, its current provisions, and its likely future provisions. It may indeed have been "entirely reasonable"[7] for Congress to delegate this task to trustees, despite their inherent bias. However, presuming trustees' assessments to be correct and stripping the arbitrator of any substantive power to review their subjective determinations removes the only protection available to safeguard employers' due process rights. Only by striking down the presumption of correctness can this Court ensure that an impartial decision maker, the arbitrator, will afford employers the meaningful review of their withdrawal liability assessments that the fifth amendment requires.

A. Trustees Function as a Tribunal, Exercising Significant Discretion in Assessing Withdrawal Liability.

Contrary to the assertions of the Pension Benefit Guaranty Corporation ("PBGC") and the United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"),[8] trustees of multiemployer pension plans are decision makers who are intimately involved in the process of assessing withdrawal liability. Trustees make numerous adjudicative decisions, both in determining whether a variety of statutory exceptions apply to reduce the amount of liability, and in choosing the various actuarial assumptions and underlying data to be used in the calculations. References to trustees'

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[6] *Keith Fulton & Sons*, 762 F.2d at 1146 (Aldrich, J., dissenting).

[7] See PBGC brief at 30.

[8] PBGC brief at 34-41; Plan brief at 23-27.

limitations under "detailed and explicit statutory guides" [9] and "precis[e] . . . Congressionally-prescribed standards" [10] simply ignore trustees' broad latitude in the assessment process and the reality that trustees' decisions may increase or decrease liability by thousands of dollars, or eliminate it altogether. Far from performing a mechanical task of inserting predetermined numbers into a fixed formula, trustees are deeply involved in all aspects of the assessment process, and have vast power in determining the final liability figure.

1. *Trustees influence the choice of actuarial assumptions and the projection of underlying data.*

One way trustees influence withdrawal liability calculations is in the selection of actuarial assumptions. Technically, the assumptions and methods chosen represent the best judgment of plan actuaries, who are professional advisors to trustees in plan management and liability calculations. Indeed, the Act requires that the assumptions and methods used be "reasonable (taking into account the experience of the plan and reasonable expectations)," and, "in combination, offer the actuary's best estimate of anticipated experience under the plan." [11] However, an actuary's "best estimate of anticipated experience under the plan" clearly can be influenced by trustees' judgments in these areas. Indeed, the PBGC itself has recognized trustees' power in this area, stating: "[trustees] shall *approve* the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses." [12] Trustees' evaluation of a number of

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[9] PBGC brief at 34, *quoting Keith Fulton & Sons*, 762 F.2d at 1141, *quoting Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984).

[10] PBGC brief at 35, *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. at 1237-38.

[11] 29 U.S.C. § 1393(a)(1).

[12] 48 Fed. Reg. 31,252 (1983) (proposed rule) (emphasis added). In addition, the American Academy of Actuaries recommends that

subjective variables[13] thus is a critical factor in the assessment process, and has a pronounced effect on the amount ultimately assessed.[14] The statutory standards of "reasonableness" and "best estimate" leave trustees great latitude in the selection of assumptions and methods, and actuaries may utilize methods that comport with trustees' judgments without breaching their duties in any way.[15]

Moreover, when a fund's information on beneficiaries is incomplete, the gap must be filled by assumptions or projections. Data must be selected to use as the basis

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the actuary "take into account, to the extent he deems suitable, general or specific information available from other sources, including the plan sponsor, plan administrator, investment managers, accountants, economists, etc." American Academy of Actuaries, *1987 Yearbook*, Pension Plan Recommendations & Interpretations, Recommendation A, § 6.7 at 359. The Academy recognizes that "[a]s a result of these considerations, the actuary may develop actuarial assumptions that differ from plan to plan . . . ." *Id.*

[13] In addition to the variables noted by the PBGC, these assumptions may involve evaluation of the health of an industry, future levels of employment (including workforce needs, average hours to be worked, disability rates, salary projections), retirement age of employees, percentage of employees that will become vested, valuation of plan assets, future rate of return on plan assets, and funding assumptions (how much money must be contributed in the present year to meet the ongoing needs of the plan).

[14] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d 575, 576-77 (7th Cir. 1983) ("Apparently the trustees of the Central States Fund considered three different actuarial estimates of unfunded vested benefits ranging from $2.047 billion to $4.108 billion before settling on the figure of $3.576 billion that provided the basis for the claims assessed against the withdrawing companies.").

[15] PBGC's undisputed assertion that "an enrolled actuary may have his enrollment suspended or terminated if he 'has failed to discharge his duties under [ERISA]'" (PBGC brief at 36 n.27, citing 29 U.S.C. § 1242(b)(1)) ignores the fact that an actuary's conclusion that assumptions favored by trustees are reasonable does not in any way constitute a failure by the actuary to discharge his duties.

for analysis, and statistical methods chosen to apply to them.[16] These assumptions can have a considerable effect on actuarial valuations. One GAO study concluded that the lack of complete participant data is "causing liabilities and costs of some plans to be under- or over-stated by millions of dollars." [17]

Thus, it is clear that trustees' decisions have a tremendous effect on the amount of withdrawal liability ultimately assessed, and their role is far from ministerial.

2. *Trustees rule on the applicability of statutory exceptions.*

The MPPAA's presumption of correctness applies to much more than withdrawal liability calculations. Section 104(2) provides that *any* determination trustees make under sections 1381 through 1399 and section 1405 are presumed correct.[18] As more fully detailed in the Appellees' brief,[19] these 20 sections of the Act charge trustees with making a variety of difficult and subjective determinations that have a profound effect on withdrawal liability. For example, trustees must determine whether and on what date an employer "permanently cease[d]" to have an obligation to contribute to the plan; whether

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[16] These data may include the number of covered employees and other beneficiaries, the number of vested employees, and the length of employees' credited service. While PBGC disputes that assessing withdrawal liability involves "case-specific, fact-bound adjudications" (PBGC brief at 28), it is difficult to imagine determinations more case-specific or fact-bound than these.

[17] *See* Comptroller General's Report to the Congress: *Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD-84-38 (1984) (cover). In one plan, when the previously missing birthdates for 12,000 participants were obtained, the actuarial liability increased by about 46 million dollars. *Id.* at iii.

[18] 29 U.S.C. § 1401(a)(3)(A).

[19] See Brief of Appellees at 21-22.

and when a company "permanently cease[d] all covered operations"; whether any of the specialized industry provisions apply; whether a "bona fide, arm's-length sale of assets to an unrelated party" occurred; and whether there was a "labor dispute." Each of these determinations contains subjective elements; for example: has the company's obligation to contribute *permanently* ceased? *When* did it cease?[20] Was the sale of assets *bona fide*? Was the sale conducted at *"arm's length?"*

PBGC contends that the applicability of many of these provisions is a matter of legal interpretation, as opposed to factual determination. It argues that since trustees' legal interpretations are not entitled to the presumption of correctness, their discretion in ruling on statutory exceptions already is tempered by *de novo* arbitral review.[21] This simply is not the case. First, as PBGC acknowledges,[22] only the preamble to a proposed rule[23] exempted legal determinations from the presumption of correctness; in its final rule, PBGC declined to "discuss the force and effect of the statutory presumptions."[24] Secondly, despite the possible distinction, many of trustees' determinations are factual, or contain both factual and legal elements. The arbitrator may not choose to divide trustees' rulings into legal conclusions and factual conclu-

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[20] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d at 578-79 ("it is unclear whether the continued employment of a small number of employees engaged in closing a business would delay the 'cessation of covered activities' beyond the date when the bulk of an employer's operations are terminated"); *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1026 (D.C. Cir. 1982) (the parties may have reached a bargaining impasse in 1979, cutting off the employer's obligation to contribute).

[21] *See* PBGC brief at 39-40.

[22] PBGC brief at 40 and n.33.

[23] 48 Fed. Reg. 31,253 (1983).

[24] 50 Fed. Reg. 34,681 (1985).

sions;[26] and even if the arbitrator does so, presuming trustees' "factual" rulings to be correct in this tremendously subjective area raises severe due process concerns.

In sum, the portrayal of withdrawal liability assessment as a non-adjudicative, "essentially legislative task"[26] in which trustees exercise an "extremely limited and circumscribed" degree of discretion[27] is unrealistic and inaccurate. Under the current statutory scheme, trustees are the decision makers, and reviewing arbitrators have extremely limited and circumscribed power. This Court should affirm the Third Circuit's decision striking down the presumption of correctness, so that employers will have an opportunity to obtain meaningful review of their withdrawal liability by truly impartial decision makers: arbitrators.

B. Trustees are Inherently Biased Against Withdrawing Employers.

"Impartial" is defined as "treating or affecting all equally."[28] Trustees, who owe a strict fiduciary duty to the fund and its beneficiaries, and no duty at all to withdrawing employers, cannot treat the interests and needs of both "equally." In fact, actuaries and plan officials participating in a 1985 GAO study cited as one of the reasons low interest rate assumptions were used for calculating withdrawal liability the fact that "*[t]rustees wanted to maximize the liability to withdrawing employers.*"[29] Congress specifically recognized this likelihood, stating:

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[26] *See* 29 C.F.R. § 2641.7(a)(1) (1986) (the arbitrator need not explicitly designate his findings of fact and conclusions of law as such).

[26] PBGC brief at 28.

[27] *Id.* at 34.

[28] *Webster's New Collegiate Dictionary* (1977) at 574.

[29] Comptroller General's Report to the Congress: *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16 (1985) at 26 (emphasis added).

> It is *expected* that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with *maximizing the total ultimate recovery* at supportable costs.[30]

As the Third Circuit below observed, the possibility that trustees may not assess excessively high withdrawal liability for fear of discouraging future participation "does not mean the trustees are less biased, only that their manifest bias will not always result in gross injustice to employers." [31] The Chamber submits that the fact that there is a *possibility* that trustee bias will not result in injustice in a particular case does not rescue the MPPAA's scheme or make it "fair enough." [32]

II. THE EXISTING SCHEME IMPOSES AN ONEROUS BURDEN ON EMPLOYERS.

Employers may incur vast withdrawal liability debts, even if they make all required contributions before withdrawing. Horror stories abound of companies that withdraw from multiemployer plans or are forced into technical withdrawal by a labor dispute or union decertification election, then are assessed huge sums in withdrawal liability, sometimes more than the net worth of the company.[33] The enormity of this burden is compounded

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[30] 126 Cong. Rec. 23,288 (Aug. 26, 1980) (statement of Senators Williams and Javits) (emphasis added).

[31] 787 F.2d at 139.

[32] *See Keith Fulton & Sons*, 762 F.2d at 1140.

[33] *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources*, 97th Cong., 2d Sess. 23 (1981) (statement of Hugh C. Shurtleff, president of Time-DC, Lubbock, Texas) ("Our liability is computed at about $30 million. Our net worth presently is between $16 and $17 million."); *id.* at 552-553 (testimony of Jay Stone, co-owner of Naman Rainwear Co., New York, New York) (withdrawal liability computed at $615,000, company's net worth $600,000); *id.* at 563 (testimony of

by the fact that § 104(2)'s presumption of correctness leaves little chance of successfully challenging the assessment.

Trustees' *prima facie* case is established as soon as they mail a claim to the employer. The company must begin to pay at once, and must meet an affirmative burden to prove that the claim is unreasonable. Thus, the contention that trustees are "merely litigants," whose withdrawal liability assessment "simply represents the plan's claim, much like a civil complaint,"[24] is far-fetched. A civil complainant bears the burden of proving entitlement to a money judgment before an impartial tribunal. Trustees bear no such burden. Nor are trustees "simply part of an administrative procedure . . . for reaching an initial determination of withdrawal liability . . . ."[25] Trustees' "initial determination" is the *final* determination unless the employer can prove it unreasonable. Thus, the characterization of employers' burden as "nothing more than . . . proving the initial withdrawal liability assessment incorrect or contrary to law"[26] proves too much; even phrased this way, this burden is too onerous to meet the fifth amendment's mandate.

Alan Lubell, president of Sandy Shaw, Inc., New York, New York) ("[O]ur withdrawal liability under MEPPA is approximately equal to our net worth [$1,300,000]").

A statement by Howard Ryder, president of Coastal Tank Lines, Akron, Ohio, is particularly telling: "We estimate that if total withdrawal liabilities are recognized, the entire unionized trucking industry will have a *negative net worth*." *Id.* at 15 (emphasis added).

[24] Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae ("Trustees") at 18.

[25] Trustees' brief at 16, *quoting Keith Fulton & Sons*, 762 F.2d at 1140.

[26] Trustees' brief at 19.

III. INVALIDATING THE PRESUMPTION OF CORRECTNESS WILL NOT OPEN THE FLOODGATES, AND EVEN IF IT WILL, THE COURT MUST STRIKE DOWN UNCONSTITUTIONAL PROVISIONS.

The role of arbitrators will not change drastically if the presumption is struck down. Arbitrators presiding over withdrawal liability challenges already perform an unusual function. The typical labor arbitrator interprets the terms of a contract, using a knowledge of the practices of the industry in general and the shop in particular, and considering the effect of a particular outcome on the future working relationship of the parties.

By contrast, an MPPAA arbitrator does not interpret the intentions of the parties as expressed in plan documents. Rather, he reviews an employer's challenge to a withdrawal liability assessment, and determines whether the employer has overcome the presumption of correctness and proved the assessment unreasonable. This determination requires a knowledge of federal pension law, pension funding theories, pension plan practices, and actuarial concepts. In sum, the role of the MPPAA arbitrator is "similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests." [37]

The MPPAA arbitrator's role would not change appreciably if the presumption were omitted. The arbitrator still would rule on whether the withdrawal liability assessment was reasonable in a given case; the burden simply would be on the trustees to prove reasonableness, rather than on the employer to prove unreasonableness.[38]

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[37] 126 Cong. Rec. 23,039 (Aug. 25, 1980) (Rep. Thompson).

[38] As one arbitrator recently stated in overturning a withdrawal liability assessment, "If de novo review is required/permitted, I would have arrived at the same valuation . . . ." *Casablanca Industries, Inc.* v. *UFCW Local 23-Giant Eagle Pension Fund*, 7 Empl. Ben. Cas. 2705, 2723 (1986) (Jaffe, Arb.).

This would not entail a "'futil[e]' . . . search for the 'correct' actuarial assumptions";[39] rather, an impartial review of the *reasonableness* of the assumptions and methods used.

Even if the fears of extended arbitration proceedings are justified, this Court should invalidate § 104(2) because it is unconstitutional. The fact that it may serve a "litigation-dampening" purpose[40] does not temper its invalidity.

CONCLUSION

Section 104(2) currently imposes an onerous and unconstitutional burden on employers withdrawing from multiemployer plans. This Court should affirm the decision of the Third Circuit below and invalidate this provision to remove the burden and encourage continued participation in multiemployer pension plans.

Respectfully submitted,

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[39] PBGC brief at 43 (citations omitted).

[40] PBGC brief at 44.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED RETAIL & WHOLESALE EMPLOYEES UNION
LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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IN THE

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OCTOBER TERM, 1986

No. 86-231
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PENSION BENEFIT GUARANTY CORPORATION

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Appellants,

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YAHN & MCDONNELL, INC., *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES
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BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICI CURIAE

The Flying Tiger Line Inc., the world's largest all-freight airline, is the principal operating subsidiary of Tiger International, Inc., a publicly traded corporation which has also

owned other trucking and freight companies.[1] Tiger submits this brief *amici curiae* in support of affirmance because it has a particular interest in the outcome of this proceeding. If this Court reverses the decision below, which held unconstitutional the presumption in arbitration that certain withdrawal liability determinations of multiemployer pension plan trustees are correct unless "unreasonable or clearly erroneous", 29 U.S.C. § 1401(a)(3)(A), a group of such plans will claim that Tiger must disprove as clearly erroneous their trustees' assertions that Tiger is a member of an "employer" control group jointly liable for approximately $36 million in withdrawal liability claims under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"). This withdrawal liability was allegedly incurred by Hall's Motor Transit Co. ("Hall's"), a former Tiger subsidiary, more than a year after Tiger had sold that subsidiary.

In 1980 Tiger purchased Hall's, an interstate trucking company founded in 1922. After the 1980 deregulation of interstate trucking, Hall's incurred substantial operating losses and by 1984 adverse financial developments in Tiger's other businesses effectively prohibited Tiger from advancing any additional financing to Hall's. After months of discussions with potential buyers and lenders, in January 1985 Tiger sold seventy-five percent of the Hall's stock to an unrelated company wholly owned by Hall's then-chief financial officer. Following the sale, Hall's was able to obtain significant wage concessions from its Teamster employees in return for an Employee Stock Ownership Plan and substantial additional financing from third-party lenders. Hall's operations and contributions to its many MPPAA pension plans continued until March 1986, when Hall's filed a voluntary petition for reorganization in the U.S. Bankruptcy Court for the Middle District of Pennsylvania. By the time of Hall's petition and concurrent cutback in operations, Tiger had not had any participation in or control of

[1] The Flying Tiger Line Inc. is 99% owned by Tiger International, Inc., which also owns Warren Transport, Inc., a company engaged in specialized hauling. These three entities are referred to herein collectively as "Tiger".

Hall's management or operations for more than a year and had no equity interest in Hall's.

Since the Hall's reorganization filing, the Hall's plans have made more than $36 million in MPPAA withdrawal liability claims against Hall's. Several Hall's plans also asserted their trustees' view that Tiger could be claimed to be an "employer" subject to MPPAA and jointly liable with Hall's for any Hall's withdrawal liability notwithstanding Tiger's divestiture of Hall's. On July 3, 1986 Tiger commenced an action in federal district court against the plans that asserted withdrawal liability claims against Hall's, seeking declarations (1) that Tiger and its affiliates are not members of an "employer" control group, 29 U.S.C. § 1301(b), jointly liable for Hall's withdrawal liability and (2) that MPPAA, including 29 U.S.C. § 1401(a)(3)(A), is unconstitutional on its face and as applied to Tiger. *See IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129 (3d Cir. 1986) (advising potential control group members to seek judicial declarations of their "employer" control group status).

The Hall's plans moved to dismiss. They argued that the "real" issue of Tiger's complaint arose from their trustees' prospective determinations that a principal purpose of Tiger's January 1985 sale of Hall's was to evade or avoid withdrawal liability, allowing these trustees to disregard that sale under 29 U.S.C. § 1392(c) and consider Tiger still within the Hall's "employer" control group liable for withdrawal liability subsequently incurred by Hall's. Tiger's purported "employer" status, described by the largest plan claimant as "essentially the equivalent of a fraud case" against Tiger, was claimed to be factual in nature and disputable by Tiger only under MPPAA procedures, particularly MPPAA arbitration.

On September 12, 1986 the district court ruled, *inter alia*, that it would hear and resolve the dispute on Tiger's "employer" status. *The Flying Tiger Line Inc. v. Central States, Southeast and Southwest Areas Pension Plan*, 7 E.B.C. 2385, 2390-91 (D. Del. 1986). The Hall's plans moved for reargument or a stay pending MPPAA arbitration. The Pension

Benefit Guaranty Corporation ("PBGC") filed a letter brief supporting the Hall's plans' motion to relegate any dispute on Tiger's "employer" status, including the plans' "evade or avoid" assertions, to MPPAA arbitration under 29 U.S.C. § 1401(a)(1). On October 17, 1986, the district court reversed its prior determination, concluded that prospective plan trustee determinations to disregard Tiger's sale of Hall's and treat Tiger as a jointly liable "employer" created a "need to develop a factual record" requiring MPPAA arbitration, and stayed Tiger's action pending such a MPPAA arbitration. 7 E.B.C. 2392, 2396-97 (D. Del. 1986). Tiger is appealing this decision to the U.S. Court of Appeals for the Third Circuit.[2] If unsuccessful on appeal, Tiger will be required to submit its claim not to be a MPPAA "employer" with Hall's to MPPAA trustee determination, review and arbitration before it can present that claim to a federal district court.

Shortly after the district court action was stayed, the Hall's plan with the largest withdrawal liability claim, Central States, Southeast and Southwest Areas Pension Plan ("Central States"), advised Tiger that its

> "Board of Trustees has determined that a principal purpose of the Hall's divestiture by [Tiger] was to avoid or evade withdrawal liability. Accordingly, the Board of Trustees has determined, pursuant to [29 U.S.C. § 1392(c)], that it must disregard that transaction and that [Tiger] is the employer responsible for Hall's withdrawal

[2] Nos. 86-5817, 5931, 87-3063 (consolidated). On December 4, 1986 the district court, stating it found the issues discussed in its two opinions "extremely difficult", amended its October 17 order to provide for permissive appeal, 28 U.S.C. § 1292(b), and stayed all further proceedings pending completion of appellate review. Tiger's petition to appeal was granted by the Court of Appeals on January 9, 1987. It is Tiger's position on appeal that its "employer" status is a proper question for judicial, and not arbitral, determination; that the "employer" issue is not converted to one for mandatory arbitration by the plans' reliance on an "evade or avoid" assertion; that the plans have no legally adequate basis to claim that the Hall's divestiture can be disregarded as sham under 29 U.S.C. § 1392(c); that Section 1392(c) does not of itself give rise to MPPAA arbitral jurisdiction; and that mandatory arbitration of Tiger's "employer" status, the predicate to arbitral jurisdiction here, is contrary to federal law.

> liability. . . . The amount of $1,741,349.51 [of a total withdrawal liability assessment of $15,539,816.66] is now past due and payable immediately."

Central States indicated its trustees' determination was based on affidavits submitted in the Delaware litigation by its employees and by a lawyer for another Hall's plan. Shortly thereafter Central States demanded a MPPAA arbitration, purportedly pursuant to 29 U.S.C. § 1401(a)(1), "seek[ing] an award confirming the determination of the Board of Trustees" that Tiger is liable for the claimed withdrawal liability.

If Tiger is forced to arbitrate its "employer" status, a reversal by this Court in the instant case will prevent Tiger from receiving a procedurally fair resolution of the legal and factual issues assertedly implicated by the Hall's plans' claims that Tiger is an "employer" jointly liable with Hall's for Hall's withdrawal liability.

SUMMARY OF ARGUMENT

A party being deprived of property has a due process right to a decision by an unbiased decisionmaker. A scheme for resolving disputes about that deprivation that relies on biased decisionmakers incorporates a substantial likelihood of a biased and erroneous decision. That likelihood is not reduced and the denial of due process is not remedied if those biased decisions remain insulated from plenary review. Under MPPAA's dispute resolution procedures, biased plan trustees determine whether an employer has withdrawn and the amount of its resulting withdrawal liability, with chalienge and review of their determinations in mandatory MPPAA arbitrations that are required to presume trustee determinations correct unless unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3)(A) (the "Arbitral Presumption"). MPPAA does not provide for a resolution of withdrawal liability disputes by an impartial decisionmaker with full authority to consider the disputed issue *de novo* and plainly denies due process to alleged withdrawing employers.

In urging that the Third Circuit's decision be reversed, appellants assert that that court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability". PBGC Br. 18. Appellants insist that the trustee determinations insulated by the Arbitral Presumption are nondiscretionary, ministerial, "technical actuarial" or legislative, do not require historic fact-finding or weighing evidence and do not constitute case-by-case decisionmaking. Attempting to justify MPPAA's "stacked deck", appellants focus on plan selection of a method for calculating withdrawal liability and the resulting calculations and assert that these "determinations" are not "adjudications" and therefore due process does not require that they be made by a decisionmaker free from any bias or interest.

It is appellants' argument, not the decision below, that disregards the variety of case-specific determinations, including disputed factual determinations, that MPPAA plan trustees actually make in pursuing withdrawal liability claims. Elsewhere both plan trustees and the PBGC maintain that virtually any dispute with a plan's withdrawal liability determination and assessment is subject to challenge only within MPPAA's procedures for "reasonable" trustee review, arbitration constrained by the Arbitral Presumption and judicial review constrained by the similar presumption in 29 U.S.C. § 1401(c). The PBGC has urged federal courts and advised MPPAA plans that the MPPAA dispute procedures apply to a wide range of plan trustee determinations. Lower court decisions recognize that a MPPAA plan may, in addition to determining the amount of withdrawal liability, determine and then relegate to MPPAA dispute procedures issues of whether a withdrawal has occurred, the time and extent of that withdrawal and the applicability of statutory exclusions of certain events from liability-triggering withdrawals. Even if limited to the fact of withdrawal and calculation of the resulting withdrawal liability, those determinations are sufficiently case-specific and fact-based adjudications of property interests to be matters on which a purportedly liable employer is entitled to an unbiased

decisionmaker. MPPAA's procedures nowhere provide or permit such an unbiased decision.

This Court's decisions recognize that even the appearance of bias or interest will disqualify a decisionmaker. Appellants' argument, that plan trustees are not necessarily compelled by their fiduciary duties to maximize withdrawal liability claims against every withdrawn employer, does not address or rebut the fact that plan trustees are free to be biased against withdrawn employers; owe fiduciary duties solely to the plans and not to employers; are unlikely to resist bias in favor of their plans; have clear incentives for bias against withdrawing employers; and have repeatedly demonstrated their bias against assertedly withdrawing employers in attempts to increase withdrawal liability receipts. Biased plan trustees making case-specific, discretionary (and assertedly factual) determinations of withdrawal liability plainly violate the Due Process clause of the Fifth Amendment, and seriously slanted MPPAA arbitral review does not constitute the *de novo* inquiry by an unbiased decisionmaker necessary to cure that denial of due process.

ARGUMENT

THE PRESUMPTIVE VALIDITY OF PLAN DETERMINATIONS MANDATED BY 29 U.S.C. § 1401(a)(3)(A) UNCONSTITUTIONALLY DEPRIVES EMPLOYERS OF THEIR DUE PROCESS RIGHT TO AN IMPARTIAL DECISIONMAKER.

It is a basic precept of due process that the process accorded a person threatened with a deprivation of life, liberty or property must include at a minimum an unbiased and disinterested decisionmaker. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court traced this requirement as far back as fourteenth-century England, *id.* at 524, and concluded:

> "All questions of judicial qualification may not involve constitutional validity. . . . But it certainly violates the Fourteenth Amendment, and deprives a defendant in a

> criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523.

This "requirement of neutrality has been jealously guarded by this Court", *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); applies equally under the Fifth Amendment to federal procedures, *id.; Schweicker v. McClure*, 456 U.S. 188 (1982); governs civil administrative proceedings, *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); and is infringed if the decisionmaker is an officer or agent of an entity with a pecuniary interest in the proceedings, even though that officer does not himself have a direct, personal, pecuniary interest in the proceedings. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Proof of actual influence, bias or error in the challenged proceeding is not necessary to find a violation of this requirement of neutrality:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Every procedure which would offer a possible temptation to the average man* as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true* between the State and the accused, denies the latter due process of law." *Tumey, supra*, 273 U.S. at 532 (emphasis added); *accord Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1587 (1986).

Applying the principle of these cases, the Court of Appeals for the Third Circuit found that MPPAA's dispute procedures violate the Fifth Amendment insofar as they grant a presumption of correctness, reversible only if proven "unreasonable or clearly erroneous", to determinations by pension plan trustees who "have a natural interest and may even consider it a duty to maximize the fund by extracting as much money as possible

from withdrawing employers." J.S. App. 21a.[3] MPPAA dispute procedures have been urged and held to include review of case-specific adjudicatory determinations by trustees who have substantial temptation to reach biased results. Because MPPAA dispute procedures do not require or even permit *de novo* review of those determinations, this Court should affirm the decision below and hold that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment.

A. *MPPAA Trustee Determinations Are Not Limited by the Statute or in Practice to "Legislative", "Nonadjudicative" or "Nondiscretionary" Matters.*

Appellants' present arguments rely heavily on the opinion for the court in *Keith Fulton & Sons, Inc. v. New England Teamsters*, 762 F.2d 1137 (1st Cir. 1985) (en banc), and Chief Judge Seitz's dissent in the case now on review. J.S. App. 35a-40a. Both these opinions proceed from the mistaken premise that MPPAA plan trustees make only ministerial or nonadjudicative decisions, primarily calculations, and lack the

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[3] Contrary opinions in other courts of appeals have relied on a narrow reading of the scope of "determinations" subject to the Arbitral Presumption. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1137, 1140 (1st Cir. 1985) (en banc); *Board of Trustees of the Western Conf. of Teamsters Pension Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Others have recast that presumption merely to shift the burden of proof in arbitration and not also to raise that burden from the simple preponderance of evidence in a *de novo* inquiry to the "unreasonable or clearly erroneous" standard MPPAA actually specifies. *Washington Star Co. v. International Typographical U. Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). In *Washington Star*, the court also stated: "We conclude that the trustees' fiduciary duties require them to act neutrally and reasonably in making withdrawal liability determinations." 729 F.2d at 1511. Similarly, the Second Circuit concluded that, because both employees and employers appointed trustees, the trustees were not biased. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr v. Bakery, Confec. and Tobacco Workers*, 467 U.S. 1257 (1984).

discretion necessary for them unfairly to assess withdrawal liability against a withdrawn employer:

> "We emphasize first that we do not perceive the trustees to be performing an adjudicatory role when they calculate the withdrawal liability, and so we do not believe we in any way mar the purity of the judicial process in deciding that their bias is not of constitutional dimension." *Keith Fulton, supra*, 762 F.2d at 1140; *see* J.S. App. 35a.

Appellants adopt a similar approach to justify reversal here. They assert that an important factor in the plans' ability to collect withdrawal liability is their right to rely in mandatory arbitration on the Arbitral Presumption,[4] which states:

> "For purposes of any proceeding under this section [1401], any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).

On the face of the MPPAA statute, the scope of matters entitled to this presumption is the same as the scope of disputes subject to arbitral jurisdiction:

> "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).

Appellants urge that this statutory scheme for enforcing the withdrawal liability claims of plan trustees does not violate due process because it does not confer upon MPPAA plan trustees

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[4] Brief for Appellant PBGC ("PBGC Br."), p. 41; Brief for Appellant United Retail & Whse. Emps. Teamsters U. Local No. 115 Pension Plan ("Plan Br."), pp. 32-33; Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans ("NCCMP Br."), p. 4.

any authority to make case-specific, fact-based determinations. According to the PBGC's brief:

> "[Plan] trustees do not engage in any of the functions that normally attend an adjudicative decision. They do not determine the 'truth' of disputed versions of historical facts, they do not make credibility determinations, and they do not seek to arrive at the 'right' answer to a question". PBGC Br. 19.

The trustee "determinations" subject to MPPAA arbitration and the Arbitral Presumption are claimed to be so "extremely limited and circumscribed by statutory directives", PBGC Br. 34, that an unbiased decisionmaker is unnecessary. Appellants repeatedly justify the Arbitral Presumption by quoting legislative history to argue that this heavy presumption was designed and intended by Congress to reduce disputes and delay over "technical actuarial matters".[5]

Even appellants' limited view of the scope of MPPAA dispute procedures recognizes that plan trustees have the authority to make case-specific fact-based determinations in calculating withdrawal liability. Therefore an unbiased decisionmaker is constitutionally required. Tiger's own experience, and that of many other entities whose disputes have been reported, also demonstrates that ministerial calculations are not all that trustees determine or all that the Arbitral Presumption is claimed to protect. Appellants' rationale fails entirely because in practice MPPAA trustees and the PBGC assert substantial trustee authority to "determine" a wide range of issues against purportedly liable companies and demand that these assessments can be challenged only under mandatory MPPAA arbitrations, where they are sheltered by the Arbitral Presumption. These trustee determinations are the basis for massive liability assessments on which payments can begin even before MPPAA procedures are completed. 29 U.S.C.

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[5] PBGC Br. 8; Plan Br. 7; PBGC Jurisd. Statemt. 6 n.6; NCCMP Br. 13; *quoting* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076; The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20 (Comm. print 1980).

§ 1401(d). Their determinations are not so free of discretion or so ministerial in nature that they may constitutionally be presumed correct unless "clearly erroneous".

MPPAA provides that "when an employer withdraws from a multiemployer plan, the plan sponsor . . . shall (1) determine the amount of the employer's withdrawal liability". 29 U.S.C. § 1382.[6] Although this language does not expressly direct plan trustees to determine whether a withdrawal has occurred, federal courts have held that the fact that an employer has withdrawn within the meaning of MPPAA, including necessarily related issues of whether an exemption is applicable in a particular case, is an appropriate plan trustee determination and is, in the usual course, subject to the MPPAA dispute procedures. "The determinations generally required by 29 U.S.C. §§ 1381 through 1399 involve questions of whether an employer has . . . withdrawn from a plan and what the amount, if any, of its consequent liability should be."[7] Courts have also ordered arbitration (or foreclosed employers who failed to arbitrate from raising defenses) on a variety of other trustee determinations that are undeniably fact- and case-specific:

—Whether under the provisions of a collective bargaining agreement an employer effected a permanent

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[6] Subject to various exceptions and conditions, "a complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). Subject to various exceptions and criteria, "there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year (1) there is a 70-percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation." 29 U.S.C. § 1385(a).

[7] *Baldwin v. Shopmen's Ironworkers Pension Trust*, 3 E.B.C. 1713, 1716 (C.D. Cal. 1982); *see, e.g., Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 284 (3d Cir. 1986). The PBGC has likewise advised that "a dispute over . . . a determination regarding the occurrence of a withdrawal would be subject to the arbitration provision of" MPPAA. *E.g.*, PBGC Op. 83-18, 10 Pens. Rep. (BNA) 1819 (1983). *See* pp. 13-16 *infra*. In urging reversal, the brief *amicus curiae* of the Mine Workers expressly acknowledges that this determination is made by the plan trustees. Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae in Support of Appellant ("UMW Br."), p. 17.

cessation of operations on a particular date, and whether a binding agreement to withdraw from a MPPAA plan existed. *Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986).

—Whether sale of certain facilities constituted a withdrawal or an exempt "sale of assets" under 29 U.S.C. § 1384. *Grand Union Co. v. Food Employers Labor Rels. Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987); *see also New York State Teamsters Conf. Pension & Ret. Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1009 (N.D.N.Y. 1985).

—Whether an employer's cessation of contributions during a labor dispute constituted a complete withdrawal or was within the statute's "labor dispute" exception, 29 U.S.C. § 1398, *Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 127 (D.C. Cir. 1984).

—Whether two motor freight terminals eight miles apart were separate "facilities" within the meaning of 29 U.S.C. § 1397(a)(2) for calculating withdrawal liability. *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 634 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *accord Williamson Shaft Contracting Co. v. United Mine Workers 1974 Pension Plan*, 585 F. Supp. 633, 634 (W.D. Pa. 1984).

The PBGC here urges that the lower court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability." PBGC Br. 18. Yet the PBGC has repeatedly advised MPPAA plans that plan trustees are to make a substantial range of unconstrained, case-specific determinations and that these determinations are subject to MPPAA dispute procedures, including mandatory arbitration under Section 1401(a). The PBGC has opined:

"Under the multiemployer provisions of ERISA, *the initial responsibility for deciding factual questions necessary to determine whether any particular action constitutes a*

> *withdrawal* from a multiemployer plan lies with the plan sponsor. . . . [A]ny disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts." PBGC Op. 86-21 (1986) (emphasis added).[8]

The PBGC has also opined that plan trustees may determine and subject to MPPAA dispute procedures the interpretation of statutory provisions:

> "The MPPAA places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom on the plan sponsor. Similarly the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for determining such questions as the meaning of 'substantially all' in [29 U.S.C. § 1389]. If a plan sponsor makes any such determination, and the employer objects in any way, ERISA provides in [29 U.S.C. §§ 1399 and 1401] a procedure for resolving the dispute." PBGC Op. 83-23 (1983).[9]

The determination that a withdrawal has occurred and the issues reflected in that determination permit plan trustees substantial latitude in making decisions that result in imposition

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[8] The PBGC Opinions cited herein are available on LEXIS, Labor library, PBGC file.

[9] The PBGC states that its position is that a MPPAA arbitrator need not presume that a plan's legal conclusions are correct, although this position was not incorporated in its final rule on MPPAA arbitration. PBGC Br. 40 n.33. The PBGC's present reliance on this position ignores the trustees' initial ability to "determine" both the facts and the law and their resulting ability to limit review. Plan trustees can formulate their "determinations" and characterize issues as "factual" or "legal". In doing so plan trustees can both achieve the desired result and substantially protect that result from any *de novo* review limited to purely legal questions. In arguing that a MPPAA dispute should not go forward in court as opposed to arbitration, the PBGC recently argued in the Seventh Circuit that "characterizing withdrawal liability issues as 'purely legal' or 'factual' is easier in theory than in practice . . . and in any event an inventive employer will be able to characterize at least one issue as 'purely legal.' " PBGC Br. in *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, Nos. 86-1963, 1964, 2241 (7th Cir. Sept. 15, 1986), p. 10.

of withdrawal liability. Among the case-specific questions the PBGC has expressly opined that plan trustees should determine and then subject to MPPAA dispute procedures and presumptions are the following:

> —Whether a cessation of contributions during a labor dispute constitutes a withdrawal as a "permanent cessation" under 29 U.S.C. § 1383(a) or an exempt "suspension during a labor dispute" under 29 U.S.C. § 1398. PBGC Op. 82-21 (1982).
>
> —Whether a shift of operations from one discrete geographic location to another is a continuation of operations or a cessation of operations at a facility, triggering a partial withdrawal, and whether the change in location was a "sham" intended to avoid the occurrence of a withdrawal. PBGC Op. 82-22 (1982).
>
> —Whether a company that leased employees from a MPPAA employer but had not itself signed a collective bargaining agreement or contributed to a MPPAA plan nonetheless had a duty under federal labor law to make pension contributions and thus had an obligation to pay withdrawal liability under 29 U.S.C. § 1392(a), and whether termination of the leasing agreement constituted a withdrawal. PBGC Op. 85-14, 13 Pens. Rep. (BNA) 30 (1986).
>
> —Whether "under all the circumstances" the principal purpose of a transaction that would otherwise not constitute a withdrawal was intended to evade or avoid withdrawal liability and therefore could be determined to be a liability-triggering withdrawal. PBGC Op. 85-15, 13 Pens. Rep. (BNA) 29-30 (1986).

Even calculations determining the amount of withdrawal liability are premised in part on case-specific trustee determinations subject to the MPPAA dispute procedures. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 674 & n.43 (N.D. Ill. 1986) (holding that applying Section

1401(a)(3)(A) to calculations of withdrawal liability violates due process).[10] Plan trustees, with the encouragement of the PBGC, have claimed the authority in the course of their withdrawal liability calculations to disregard transactions that they believe evidence "a principal purpose . . . to evade or avoid" withdrawal liability. 29 U.S.C. § 1392(c); *see Robbins, supra*, 636 F. Supp. at 657 n.27; PBGC Op. 83-10, 10 Pens. Rep. (BNA) 1387 (1983) (determination of contribution base may ignore liability-reducing transactions determined to "evade or avoid" liability).

Tiger's own experience demonstrates the wider range of determinations that MPPAA plans and the PBGC claim to be within the authority of the plan trustees and subject to dispute only under MPPAA dispute procedures and the Arbitral Presumption. In the *Flying Tiger* action, the district court concluded in its second opinion that the plans' assertions that Tiger was an "employer" with Hall's, notwithstanding the divestiture of Hall's by Tiger a year before any withdrawal liability was incurred, raised issues that must be arbitrated between the plans and Tiger because the plans purported to disregard the divestiture as a sham transaction intended to "evade or avoid" MPPAA liability. The district court stated that "once facts are in dispute . . . the court's task becomes more difficult and intercedes into the proper role of the arbitrator". 7 E.B.C. at 2397. The PBGC had advised the district court that the question of Tiger's purported "employer" status under MPPAA—the dispute the plans insisted could only be arbitrated—should be arbitrated as a disputed plan determination under Section 1401(a):

> "The PBGC believes . . . that arbitration should proceed. . . . [T]he PBGC agrees that the Court's concerns can be

[10] In *Combs v. Western Coal Corp.*, 611 F. Supp. 917 (D.D.C. 1985), a plan's admittedly erroneous fact determination that a division was a distinct entity from the withdrawn employer resulted in an over-assessment of withdrawal liability of approximately $250,000. The plan recognized its error but refused to alter its assessment and maintained that the employer, which had requested arbitration, had failed to properly initiate arbitration pursuant to plan rules. *Id.* at 919. The court agreed that the employer had failed properly to initiate arbitration and entered judgment for the withdrawal liability amount calculated from the fund's admitted factual error. *Id.* at 923.

> alleviated by the 'alternative' suggested by Central States . . . of a 'stay' of this action pending arbitration of the issues relating to the identity of the employer in *Tiger* . . . [N]othing in the statute prohibits a court from ordering the statutorily mandated arbitration. See 29 U.S.C. § 1401(a)(1)." Letter of E. R. Mackiewicz (by P. H. Gould) to Hon. C. M. Wright, dated October 6, 1986.

The subsequent "determination" by the Central States trustees that Tiger was an "employer" with Hall's because in the trustees' view "a principal purpose of the Hall's divestiture . . . was to avoid or evade withdrawal liability" can only be described as a case-specific attempt to adjudicate Tiger's liability. Central States' attempts to force dispute of this "determination" into a MPPAA arbitration are obviously designed to avoid *de novo* inquiry by an unbiased decisionmaker.

MPPAA cannot fairly be read to state that trustee determinations do not encompass case-specific and factual determinations of liability requiring an unbiased decisionmaker. The Hall's plans persuaded the district court that Tiger's case should be distinguished from other cases refusing to compel arbitration of "employer" status because their disputed factual assertions presented the equivalent of a fraud case. *Flying Tiger, supra*, 7 E.B.C. at 2397. Other courts have accepted the arguments of MPPAA plans and the PBGC and ordered arbitration of other MPPAA disputes on the ground that a factual issue was present. *E.g., Warner-Lambert, supra*, 791 F.2d at 287-88; *Williamson Shaft, supra*, 585 F. Supp. at 635. If Section 1401 is properly read to limit arbitration to disputes about trustees' ministerial calculations of withdrawal liability, then the decisions compelling arbitration of other, much broader disputes arising from withdrawal liability claims cannot be correct.

To support the view that no "adjudication" is implicated in a trustee determination and the right to an impartial decisionmaker does not apply, appellants and their *amici* rely on four decisions of this Court. Their reliance is misplaced. In each of those cases the Court found that no possibility of bias or

interest was shown. *Schweicker v. McClure*, 456 U.S. 188, 196 (1982) ("no basis" for conclusion of bias); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("too remote and insubstantial"); *Friedman v. Rogers*, 440 U.S. 1, 18 (1979); *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 496 (1976). Moreover, the fact determinations of the allegedly biased decisionmaker were subject to *de novo* review in *Marshall*, 446 U.S. at 245, and in *Hortonville*, 426 U.S. at 485, 494 ("no possibility of an erroneous factual determination"), and the regulatory scheme in *Schweicker* provided for two *de novo* reviews, by a reviewing official and a hearing officer. 456 U.S. at 191. Those cases do not indicate that due process permits a critical determination of liability, however ministerial, to be entrusted to a biased party and insulated from *de novo* review.[11] *Cf. Dixon v. Love*, 431 U.S. 105, 109-10, 113-14 (1977) (examining procedural remedies to correct deprivation of driver's license based on clerical error).

B. *Multiemployer Plan Trustees Are Undeniably Biased in Favor of Those Plans and Cannot "Hold the Balance Nice, Clear and True" Between the Plan and its Adversary—the Withdrawing Employer.*

The withdrawal liability determinations made by MPPAA trustees commonly encompass case-specific determinations based on historic facts and need an unbiased, disinterested decisionmaker before their enforcement can have any claim to due process. The trustees' fiduciary obligations to their plans create a clear possibility of favoritism toward the plan and against the withdrawn former participant sufficient to disqualify them as unbiased decisionmakers.

Addressing the apparent bias of plan trustees, appellants and their *amici* effectively admit that, whether or not plan trustees are legally obligated to be biased to maximize with-

[11] *See Wolkenstein v. Reville*, 694 F.2d 35, 39-41 (2d Cir. 1982) (Friendly, J.), *cert. denied*, 462 U.S. 1105 (1983) (examining and rejecting the argument that the determination whether a public employee had engaged in a strike and the penalty to impose on a public employee who had done so was not adjudicative).

drawal liability in every case, they are in fact biased.[12] The appellant plan, whose trustees' determinations are challenged here, accepts that those trustees are biased but says the bias is entirely appropriate:

> "The bias of the trustees is permissible because the trustees are *obligated by Congress to be biased in favor of pension plans.* This 'bias' mirrors the 'bias' of MPPAA. . . . By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for *what is at issue is what is best for the plan.*" Plan Br. 30 (emphasis added).[13]

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[12] Multiemployer plan trustees have personal and institutional interests adverse to the allegedly withdrawing employer and therefore could not be considered unbiased individuals even were they free of their fiduciary obligations. Employee trustees are appointed by the union and may seek to use withdrawal liability to increase benefits and thereby gain or keep the support of their constituents. There is no reason to assume that union trustees will be indulgent toward employers, particularly employers withdrawing as the result of ceasing operations covered by the collective bargaining agreement with that union. Employer trustees may seek to rely on withdrawal liability assessments to reduce the need for increases in contributions. Employer trustees' constituents—employers *remaining* in the plan—have economic interests directly opposed to the interests of the *withdrawing* employer or other companies that might be claimed liable with the former plan participant. " 'Employer withdrawals . . . reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels' ". *Pension Ben. Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984) (citation omitted).

[13] The trustees' single-mindedness was also emphasized by MPPAA's Senate sponsor:

> "In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind." 126 Cong. Rec. 20182 (1980) (Sen. Williams).

The appellant plan's view accords with Judge Aldrich's metaphor for the plight of the withdrawing employer:

> "[H]e finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight." *Keith Fulton, supra*, 762 F.2d at 1146 (Aldrich, J., dissenting).

It does not push Judge Aldrich's metaphor too far to suggest that the Arbitral Presumption favoring the plan means that anyone forced into the MPPAA ring with a plan can win only by a clear knockout.

The plan trustees in this case obviously understand that their duty in determining withdrawal liability is to serve the interests of the plan and is not to "hold the balance nice, clear and true" between the plan and the purportedly withdrawn employer whose claimed liability to the plan is at issue. As the court below recognized, this duty compels all plan trustees to resolve MPPAA withdrawal liability issues in favor of the plan's interests. Appellants concede that the trustees are obliged "to achieve a result solely in the interest of plan participants and beneficiaries." PBGC Br. 32; *accord* Plan Br. 21. A decisionmaker whose only inquiry in a case before him is whether his principal, one of the parties before him, desires a particular outcome is clearly faced with "a possible temptation . . . which might lead him not to hold the balance nice, clear and true" between the plan and the employer. *Tumey, supra,* 273 U.S. at 532.

Another response of appellants to the obvious bias of the trustees is to posit that plan trustees might, to serve long-term interests of the plan in encouraging new employer enrollment, choose occasionally to forbear from overreaching. PBGC Br. 31-33; Plan Br. 23. Appellants suggest that trustees "must also consider whether minimizing withdrawal liability assessments to encourage employers to enter the plan would further Congress's goal of long-term stability." PBGC Br. 34; *accord* Plan Br. 21, *quoting Keith Fulton, supra,* 762 F.2d at 1142-43. Appellants give no indication or reason to believe that any MPPAA plan has minimized withdrawal liability claims to encourage new employers.[14]

[14] A plan interested in encouraging new membership presumably would be more likely to avail itself of the optional "free look" rule for new employers, 29 U.S.C. § 1390, than to minimize the withdrawal liability of a former employer in the hope that a prospective new employer would be led to believe that the plan will be fair to it and therefore join. The Comptroller General's study cited by appellants states that 89% of surveyed MPPAA plans choose not to offer the "free look" option, a statistic that indicates that trustees have not been much motivated by solicitude to new entrants. Comptroller General's Report, *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans,* GAO/HRD-85-58, p. 62 (1985).

Congress created in MPPAA an administrative scheme that permits plan trustees to make withdrawal liability determinations, decisions that the Fifth Amendment requires be made or reviewed *de novo* by an unbiased and disinterested decisionmaker if they are to be enforceable liabilities. The likely result of the trustees' bias is that they will err in favor of their plans. Indeed, the National Coordinating Committee asserts in its *amicus* brief that almost half of the reported MPPAA arbitrations concluded that the trustees' determination under review was "unreasonable or clearly erroneous". NCCMP Br. 14 & n.10. It stands to reason that some portion of the other half of the arbitrated trustee determinations were also erroneous, although not sufficiently "clearly erroneous" to overcome the Arbitral Presumption. Even under the "flexible" approach to due process urged by appellants, Plan Br. 18; PBGC Br. 29; *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a procedural scheme likely more than half the time to produce an erroneous result favoring one side cannot pass constitutional muster as adequately assuring a correct result. Moreover, the right to an unbiased decisionmaker cannot be balanced away.[15]

The MPPAA provision challenged here is not constitutional because Congress intended to favor pension plans, as appellant plan appears to argue, Plan Br. 30, or because a fairer procedure would be a greater administrative burden on these plans, as the PBGC maintains. PBGC Br. 41-42. The purported hardship to plans of increased administrative ex-

[15] The Court of Appeals correctly recognized that this Court's decisions in *Mathews v. Eldridge* and similar cases does not authorize courts to balance the value of an unbiased decisionmaker against the cost of providing one. J.S. App. 20a. *Mathews* and cases applying it recognize that an unbiased decisionmaker is part of the minimum required in every case. 424 U.S. at 344; *accord Arnett v. Kennedy*, 416 U.S. 134 (1974) (White, J., concurring); *see, e.g., Schweicker, supra; Marshall v. Jerrico, supra; Mackey v. Montrym*, 443 U.S. 1, 13 (1979); *Parham v. J.R.*, 442 U.S. 584, 606 (1979); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977). An impartial decisionmaker, like notice and an opportunity to be heard, is a fundamental element of due process not subject to balancing away. *See Memphis Light, Gas & Water Div'n v. Craft*, 436 U.S. 1, 15 (1978); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975).

pense (much of it recoverable if their claims are upheld, 29 U.S.C. §§ 1401(a)(2), 1451(e)), and their preference for ease in using the "atomic bomb of withdrawal liability" (as one Hall's plan aptly characterized it to the *Flying Tiger* district court) does not extinguish the due process right of an employer to an unbiased adjudicative decision of his liability.

C. *Requiring that a MPPAA Arbitration Accept Biased Trustee Determinations Unless Clearly Erroneous Prevents an Employer from Receiving Due Process in that Arbitration.*

The Court of Appeals correctly concluded "that where an initial hearing is tainted by bias, arbitration cannot provide the requisite fair hearing if the arbitration is not *de novo*." J.S. App. 27a.[16] The lower court decided that "a full and fair *de novo* hearing before an arbitrator" would cure the bias; that Section 1401(a)(3)(A) could be severed from the remainder of the MPPAA scheme; and that "the severing of § 1401(a)(3)(A) rescue[s] the scheme's constitutionality". J.S. App. 31a. This Court should affirm these conclusions.

MPPAA's challenged presumption against the employer cannot fairly be construed, as the Mine Workers urge, merely to assign the burden of proof to the employer. UMW Br. 19. Congress's use of the well understood term "clearly erroneous"

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[16] The court relied on its earlier decision in *Goodman v. Laborers' Int'l Union*, 742 F.2d 780, 785 (3d Cir. 1984), that less than a full *de novo* determination on a new record would be insufficient to cure a decision tainted by bias. The precise issue in *Goodman* and similar cases was whether labor union procedures in disciplining a member constituted a "full and fair hearing" under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(5). *Accord Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 821 (9th Cir. 1982); *Rosario v. Ladies Garment Cutters' U.*, 605 F.2d 1228, 1243 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *see Perry v. Milk Drivers' and Dairy Emps. U.*, 656 F.2d 536, 539 (9th Cir. 1981) (*de novo* review satisfies LMRDA). The rule in *Goodman* accords with the views of other courts that a trial *de novo* would cure a biased determination. *Marshall v. Jerrico*, *supra*, 446 U.S. at 245; *Commonwealth of Pennsylvania v. United States*, 781 F.2d 334, 337 (3d Cir. 1986); *Wolkenstein v. Reville*, *supra*, 694 F.2d at 43. These three cases reason that *de novo* redetermination would cure a biased decision, but none concluded that a biased decision was present or held that *de novo* review is constitutionally sufficient.

to constrain arbitral review plainly sets out a greater burden than the "preponderance of the evidence" standard that *de novo* review entails.[17] This Court recently explained Fed. R. Civ. P. 52(a)'s "clearly erroneous" standard:

> "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard . . ., appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985), *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

This Court should construe statutes such as MPPAA to avoid constitutional questions if a saving construction is "fairly possible", but

> "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; '"[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute" or judicially rewriting it.' *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961))." *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3252 (1986).

Appellants claim Congress intended in MPPAA to reject "a procedure aimed at reaching the 'fairest' result to employers [because that] would instead be unfair to plans" and to enact instead "litigation-dampening presumptions", PBGC Br. 43-45, that were "designed by Congress to assist multi-employer

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[17] Congress's use of a term with a long-settled meaning usually requires the inference that Congress intended to adopt that meaning. *National Labor Rels. Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

plans". Plan Br. 33. Such a congressional intent would not justify depriving employers of due process, but these arguments about Congress's purpose show just how hard it is to construe this language of MPPAA in a manner consistent with due process and the purported congressional purpose.

Tiger joins appellees in urging that the Arbitral Presumption is unconstitutional, even when invoked to protect trustee determinations on only "technical actuarial matters" that purportedly permit minimal scope for trustee bias. Should the Court reject that argument and adopt appellants' view of the very limited scope of matters subject to mandatory MPPAA arbitration and the Arbitral Presumption, this saving construction should expressly construe Sections 1401(a)(1) and 1401(a)(3)(A) to apply only to such limited matters. The Arbitral Presumption cannot constitutionally be applied to the wider range of case-specific claims and findings repeatedly made by MPPAA plans and claimed by both MPPAA plans and the PBGC to be plan trustee determinations subject to mandatory MPPAA arbitration and sheltered by the Arbitral Presumption.

CONCLUSION

For the foregoing reasons, and those set forth in the brief of the appellants and in the opinion below, the Court should affirm the decision below that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Respectfully submitted,

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